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Nos. 360, 443 and 538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 360

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

AMERICAN MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 443

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

WARRIOR & GULF NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 538

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

ENTERPRISE WHEEL & CAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

ARTHUR J. GOLDBERG
DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
1001 Connecticut Ave., N. W.
Washington 6, D. C.
Attorneys for Petitioner

COOPER, MITCH,
BLACK & CRAWFORD
Of Counsel in Nos. 360 and 443

JAMES P. CLOWES
CARNEY M. LAYNE
Of Counsel in No. 538

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OPINIONS BELOW

In No. 360, the *American Manufacturing Company* case, the opinion of the District Court for the Eastern District of Tennessee (Am.R. 39)[1] is unreported. The opinion of the Court of Appeals for the Sixth Circuit (Am.R. 64) is reported at 264 F. 2d 624.

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[1] References to the record in No. 360 will be indicated by the letters "Am.R." followed by the page number in the record printed by the Clerk of this Court.

In No. 443, the *Warrior & Gulf* case, the Findings of Fact and Conclusions of Law of the District Court for the Southern District of Alabama (War.R. 102-107)[2] are reported at 168 F. Supp. 702. The opinion of the Court of Appeals for the Fifth Circuit (War.R. 109) is reported at 269 F. 2d 633.

In No. 538, the *Enterprise* case, the final opinion of the District Court for the Southern District of West Virginia (Ent.R. 1a-3)[3] is reported at 168 F. Supp. 308. The opinion of the Court of Appeals for the Fourth Circuit (Ent.R. 41) as modified (Ent.R. 50) is reported at 269 F. 2d 327.

JURISDICTION

In No. 360, the judgment of the Court of Appeals for the Sixth Circuit (Am.R. 64) was entered on March 19, 1959. A petition for rehearing was denied on April 10, 1959 (Am.R. 71). On June 4, 1959, Mr. Justice Stewart extended the time for filing a petition for certiorari to and including August 28, 1959 (Am.R. 71). The petition was filed on August 28, 1959 and granted on November 9, 1959. This Court's jurisdiction rests on 28 U. S C. § 1254(1).

In No. 443, the judgment of the Court of Appeals for the Fifth Circuit was entered on July 30, 1959 (War.R. 120).

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[2] References to the record in No. 443 will be indicated by the letters "War.R." followed by the page number in the record printed by the Clerk of this Court.

[3] References to the record in No. 538 will be preceded by the letters "Ent.R." The record here is composed of the appendices to the briefs in the court below, plus the proceedings in the court below, and is not consecutively paginated. Page references to the portion of the record in that case contained in the appendix to the appellant's brief below, which appears first in the record, will therefore be indicated by the number 1a plus the page number (e.g., Ent.R. 1a-1, Ent.R. 1a-2, etc.). Page references to the appendix to the appellee's brief will be indicated by the number 2a plus the page number (e.g., Ent.R. 2a-1, Ent.R. 2a-2, etc.). Page references to the proceedings of the court below will simply refer to the number of the page as it appears in the printed record, without any numbered prefix (e.g., Ent.R. 41, Ent.R. 42, etc.).

The petition for certiorari was filed on September 30, 1959 and granted on December 7, 1959. This Court's jurisdiction rests on 28 U. S. C. § 1254(1).

In No. 538, the judgment of the Court of Appeals for the Fourth Circuit was entered on June 16, 1959. (Ent.R. 48). On August 24, 1959, the Court modified its opinion (Ent.R. 50) and denied a petition for rehearing (Ent.R. 51). The petition for certiorari was filed on November 23, 1959 and granted on January 11, 1960. This Court's jurisdiction rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. In an action under Section 301(a) of the Labor-Management Relations Act to compel arbitration pursuant to a collective bargaining agreement containing a no-strike clause and a broad provision requiring arbitration of all grievances involving the interpretation and application of the agreement:

   (a) Is it proper for the court as a condition for ordering arbitration, to examine the merits of the grievance sought to be arbitrated and to require the moving party to demonstrate that the grievance is not "baseless" or "insubstantial"?

   (b) Is it proper for the court as a condition for ordering arbitration to construe the substantive provisions of the agreement and to require the moving party to demonstrate that the management action complained of could be deemed to violate some provision of the agreement?

2. Does a provision stating that "issues which conflict with any Federal statute in its application as established by court procedure or matters which are strictly a function of management shall not be subject to arbitration" require a court to determine, as a condition to ordering arbitration of a grievance based on provisions of the agreement other than the management clause, whether the company, in per-

forming its management functions, has violated those other provisions?

3. If a court should make the determinations set forth above as a condition to ordering arbitration:

(a) was the court below in No. 360 correct in holding the grievance to be "baseless"?

(b) was the court below in No. 443 correct in determining from the evidence that no grievance protesting the contracting out of work covered by the particular agreement could possibly be arbitrable and that the union's grievance was "insubstantial"?

4. After arbitration has taken place and a court is asked under Section 301 to enforce an arbitrator's award requiring an employer to reinstate, after the expiration date of the collective agreement, employees found to have been wrongfully discharged during its term:

(a) Is the arbitrator's determination as to whether the remedy provided by the agreement was intended to survive its expiration to be treated as a determination of a question of interpretation and application of the agreement or, to the contrary, is such a determination one of law to be decided by the court?

(b) If the question of remedy is one of interpretation and application of the agreement, may the federal courts properly, under § 301, review *de novo* the arbitrator's determinations with respect to that question?

(c) If such review is proper, should the provisions of the agreement here requiring the reinstatement of wrongfully discharged employees be construed as being applicable only to cases decided prior to the expiration date of the agreement?

(d) If the question of remedy is one of law, as the court below assumed, rather than one of interpretation of the remedial provisions of the agreement, was the court correct

in holding that an arbitrator may not, as a matter of law, prescribe restoration of the status quo after the agreement has expired as a remedy for a violation which took place during its term?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. Introduction

These are three separate cases, which come to this Court from three different circuits, and which involve three distinct sets of facts. They all involve, however, questions relating to the enforcement of arbitration agreements under Section 301 of the Taft-Hartley Act, 29 U.S.C. §185 and have been set down by this Court for consecutive argument. We will therefore treat all three cases in one combined brief.

In each of these three cases the same basic elements appear. Each involves a "grievance" which arose during the term of a collective bargaining agreement between a labor union, the United Steelworkers of America, and an employer. The agreement in each case prohibited strikes during its term, (Am.R. 13; War.R. 6, 15; Ent.R. 6-7, 18[4]) and

[4] No express prohibition of strikes appears in the record in the *Enterprise* case. It is clear, however, that the parties treated the agreement as prohibiting the employees from striking. Indeed, the very grievances involved here protested against the discharges of

provided a procedure in lieu of strikes for resolving grievances. This procedure involved the usual series of conferences at ascending levels of authority between the union and the company, and included in each case the ultimate right to appeal to an impartial arbitrator if the grievance were not settled by agreement in those conferences. Each agreement, in varying but similar language, granted to the arbitrator jurisdiction to determine questions of interpretation and application of the collective bargaining agreement arising during its term.

In all three cases, the company refused to arbitrate, and the union was forced to bring an action in a federal district court under Section 301 seeking an order compelling arbitration. In No. 538, the *Enterprise* case, such an order was granted, an arbitration was held, and an award favorable to the union was rendered, but the company refused to comply with the award. On the union's motion, the district court ordered compliance with the award. On appeal, however, the Fourth Circuit held that the award was only valid in part, and therefore enforceable only in part. That case comes to this Court, therefore, on the question of the extent to which a federal court should review a question which the parties have entrusted to an arbitrator and which he has decided.

In the other two cases, Nos. 360 and 443, the district courts and the courts of appeals refused to compel arbitration, holding that the grievances involved were not arbitrable under the respective collective bargaining agreements under which each arose, in *American Manufacturing,* because the court considered the grievance "baseless," and in *Warrior and Gulf* because the court considered the subject of the grievance "strictly a function of management." Thus these two cases come to this Court on the question of

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employees for striking during the contract term, action which the company contended, and the arbitrator found, was in violation of the agreement and a proper cause for discipline (Ent.R. 2a-18, 2a-22).

the extent, if any, to which a federal court should, before ordering arbitration, enter into an examination of the substantive issues which the parties have entrusted to the arbitrator before he has an opportunity to decide them.

The three cases together, along with *Local 1912, IAM* v. *United States Potash Co.*, 270 F. 2d 496 (10th Cir. 1959) and *Brass & Copper Workers* v. *American Brass Co.*, 45 L.R.R.M. 2379 (7th Cir. 1959), now pending in this Court on petitions for certiorari (Nos. 554 and 706, respectively), present for decision by this Court varying aspects of the basic issue as to the relative roles of the courts and arbitrators in suits arising under Section 301.

B. The American Manufacturing Case No. 360

The grievance in this case involved an employee covered by the agreement, James B. Sparks, who had been off the job due to an injury suffered in the plant. While off work, he brought an action in a state court for workmen's compensation benefits (Am.R. 26). At that time, Sparks' physician expressed the opinion that the injury had resulted in a permanent partial disability of 25% (Am.R. 53). The extent of permanent partial disability, if any, was an issue in that case, and was left unresolved when the claim was settled (Am.R. 30).

Thereafter, Sparks applied for reinstatement to his job. He submitted a statement from his physician certifying that "Mr. James Sparks is now able to return to his former duties without danger to himself or to others." (Am.R. 39). The Company refused to reinstate him. On September 23, 1957, the union filed a grievance (Am.R. 20) asserting that Sparks was entitled to return to his job by virtue of Article XIV, Seniority, of the collective bargaining agreement.

No settlement was reached, and on October 21, 1957, the union invoked the arbitration provision of the agreement (Am.R. 7-8) which provided:

> "Any disputes, misunderstandings, differences or grievances arising between the parties as to the mean-

ing, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision."

In accordance with the procedure prescribed in the agreement for choosing a Board of Arbitration, the union submitted the name of the person whom it selected to sit on the Board. The company's attorney made no objection to arbitration and, on the next day, submitted the name of the Company's representative of the Board (Am.R. 33). The union then submitted to the company a list of names of possible impartial members of the Board (Am.R. 36-37).

On October 29, the company requested a delay in the selection of the impartial member of the Board in order to enable its own doctor to re-examine Sparks (Am.R. 34). The examination was held. On November 14, the company's doctor reported that in his view Sparks "should not be placed on work requiring heavy lifting, or prolonged stooping or bending" (Am.R. 45). "Under these circumstances," the company then "declined to submit the matter to arbitration" (Am.R. 45) and informed the union that it considered the grievance not arbitrable, "since a Hamilton County Circuit Court has adjudicated the matter" (Am.R. 35).

The union then filed the present action to compel arbitration in the United States District Court for the Eastern District of Tennessee. After the company filed its answer (Am.R. 20), the union moved for summary judgment (Am.R. 32). The case was argued and submitted on the basis of the pleadings and affidavits filed by the parties.

The company contended that it was not obligated to arbitrate the issue of Sparks' right to reinstatement because Sparks' attorney and physician had asserted in connection with the workmen's compensation proceeding that Sparks was 25% permanently disabled. The company also raised

as a defense the fact that a settlement decree had been entered in that case, although the decree itself stated that "there is a serious dispute between the parties as to the amount of temporary total disability suffered by the complainant and also as to the amount of permanent partial disability sustained by the complainant" (Am.R. 31).

The union, while disputing the company's arguments based on the workmen's compensation proceeding, urged that these arguments related only to the merits of the grievance and should thus be made before the Board of Arbitration, since under the agreement that Board had jurisdiction over "any disputes, misunderstandings, differences or grievances . . . as to the meaning, interpretation, and application of the provisions of this agreement..." (Am.R. 7). The question before the court, the union urged, was simply whether there was an unresolved dispute involving the application of Article XIV of the agreement in the Sparks case.

The district court and the Court of Appeals for the Sixth Circuit each upheld the company. The district court granted summary judgment for the company on the ground that the union was estopped from asserting that Sparks was equal in "efficiency and ability" to other employees because of his contrary position in the earlier workmen's compensation proceedings (Am.R. 39-42). The court of appeals affirmed, although it expressly disagreed with the lower court's reasoning.

The opinion of the court of appeals began by rejecting the estoppel theory on which the district court had based its decision, stating that "if the grievance is an arbitrable one under the agreement, appellant has the right to have this issue, including appellee's defense of estoppel, decided by the arbitrators instead of by the Court." (Am.R. 66). The court then dismissed the company's contention that the issue raised by the grievance had been settled by the consent judgment in the workmen's compensation case, pointing

out that "the nature and extent of Sparks' injuries were not judicially determined" (Am.R. 67).

Having disposed of those preliminary issues, the court turned to an examination of the applicable provisions of the collective agreement, and concluded that the dispute between the parties concerned the proper application of the seniority Article in Sparks' case, and was therefore a dispute which "the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed" (Am.R. 68).

At this point, the court examined the evidence concerning Sparks' physical condition and the kind of work which is performed in the company's plant. It considered the allegations in Sparks' workmen's compensation complaint as to the nature of the work he had performed and the nature of his injury, it reviewed the various medical reports which both the company's and Sparks' doctors had made at various times concerning Sparks' condition, and it cited the affidavit of the Plant Manager which described the work which Sparks would do if he were reinstated and which was accompanied by photographs showing work procedure in the plant. Against this evidence it weighed the statement of Sparks' doctor that Sparks was able to return to work, and concluded that

> "in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks in the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties." (Am.R. 70)

The court did not hold that under the agreement the union could never compel arbitration of a claim that an em-

ployee, laid off due to injury, was sufficiently recovered to be entitled to reinstatement. Rather, it held that an issue which would otherwise be arbitrable will be rendered not arbitrable if the court, after examining the evidence relevant to the determination of that issue on its merits, decides that the evidence is so overwhelmingly in favor of the company's position that the union's claim is "baseless."

C. The Warrior & Gulf Case No. 443

The grievance in this case alleged that the company had violated the collective bargaining agreement by its course of action in laying off employees in the bargaining unit while contracting their work out to other employers (War.R. 104). The company, whose business is to transport steel and steel products by barge, maintains a terminal at Chicasaw, Alabama at which it performs certain maintenance and repair work on its barges. The employees at that terminal constitute the bargaining unit covered by the collective bargaining agreement in this case. Between March of 1956 and December of 1958, the company almost halved the bargaining unit from 42 to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies (War.R. 60). The contracting companies used Warrior & Gulf supervisors to lay out the Warrior & Gulf work (War.R. 36-37, 41-42); hired some of the laid-off Warrior & Gulf employees for less than the rate called for in the Warrior & Gulf contract with the union (War.R. 37); and, indeed, assigned some of the laid-off Warrior & Gulf employees to the Warrior & Gulf work in their yards (War.R. 36, 41-42). It was the theory of the union that this action constituted a partial lockout (War.R. 104) and a violation of the seniority provisions of the agreement (War.R. 2, 47), as well as a violation of the provision specifying the wages to be paid for this work (War.R. 53).

The grievance procedure of the agreement provided in pertinent part as follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.
>
> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:
>
> "A. For Maintenance Employees:
>
> "First, between the aggrieved employees, and the Foreman involved:
>
> * * * *
>
> "Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Counciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union." (War.R. 15-16).

When the union was unable to obtain a satisfactory settlement of the grievance in the preliminary steps of the grievance procedure, it requested that the matter be submitted to arbitration. Warrior & Gulf refused. The union then filed suit in the United States District Court for the Southern District of Alabama under Section 301 to compel the company to arbitrate the grievance.

The union filed a motion for preliminary injunction (War.R. 22), and the defendant filed a motion to dismiss for failure to state a claim (War.R. 24) and an answer (War.R. 29). When the motion for preliminary injunction came on for hearing all parties agreed to dispose of the entire matter at that hearing (War.R. 32).

The district court overruled the union's motion to strike the defenses, stated in the company's answer, which went to the merits of the grievance, rather than its arbitrability (War.R. 33). After hearing the evidence, substantially all of which in fact went to the merits of the grievance, the district court made findings of fact and conclusions of law, granted Warrior & Gulf's motion to dismiss the complaint, and denied the union's motion for a preliminary and permanent injunction (War.R. 101-07). The district court found as a fact that the union had not shown that the company "engaged in any conduct which has violated any of the provisions of the present labor contract." (War.R. 106). It concluded as a matter of law, in substance, that the union's grievance lacked merit because "the labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work," and "the right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration" (War.R. 107).

The Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting. The majority first noted that the agreement withdrew from the section dealing with grievances any matters "which are strictly a function of management." Interpreting the agreement before it, the majority then concluded that the grievance concerned a subject which was strictly a "matter of management" because the agreement did not limit the power of the employer to contract with others to perform services previously done by its employees (War.R. 111-112).

This conclusion, the court said, rested on two grounds. First, all subjects not specifically covered by the collective agreement remain matters of management. Second, the union in this case actually had sought to negotiate in 1956 a clause dealing with subcontracting. Under those circumstances it would be inconsistent "with basic principles governing the construction of a contract" for a court to construe it to give the union the provision it unsuccessfully sought to have incorporated (War.R. 112).

The statements in the grievance that the company's actions were "discriminatory" and constituted a "partial lockout" were not sufficient to bring the grievance into the "range of arbitration," the court said, since the actions complained of, by whatever name called, were exempted from arbitration. Any contention that they constituted a violation of the contractual provision against discrimination against members of the union or of the provisions prohibiting lockouts was "insubstantial" (War.R. 113).

Judge Rives, dissenting, limited himself to the "partial lockout" and "discrimination" contentions set forth in the grievance, although he noted that the grievance need not meet the precise requirements of strict pleadings (War.R. 113-14). The agreement, he said, contained provisions flatly prohibiting lock-outs and discrimination against union members. If, as charged, the Company's actions did constitute a partial lockout or were discriminatory, then they violated the agreement. The determination of that question, he concluded, was for the arbitrator.

The argument that subcontracting was "strictly a function of management" and that, therefore, no dispute involving subcontracting could be arbitrable he found not to withstand analysis. First, he said, the management clause in the contract did not sustain it. That clause specified management rights but did not expressly reserve the unlimited right to subcontract. Nor did the district court's finding that the company had in fact subcontracted work without

union protest in the past fill the gap. The question to be arbitrated here was not whether management's rights included the right to subcontract work. The union did not contest that right. The question was whether, under the circumstances of the case, management abused the right by exercising it in a way which violated other provisions of the agreement. That question, he said, was not "strictly" one of management's rights. Second, he said, the failure of the union to obtain the clause forbidding all subcontracting which it proposed in 1956 did not prove that the contract could not be construed in a more limited way, as prohibiting subcontracting which violated other provisions of the agreement.

Finally, he concluded, the findings of the district court that no violation of the contract occurred went to the merits of the grievance, not its arbitrability. It was unnecessary, in his view, to decide whether the Fifth Circuit should adopt the *"Cutler-Hammer"* doctrine (*International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317, *aff'd*, 297 N.Y. 519, 74 N.E. 2d 464 (1947)), as the Sixth Circuit did in the *American Manufacturing* case, or reject it as the First Circuit did in *New Bedford Products Defense Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1st Cir. 1958), since the grievance in this case was not so lacking in substance as to fall within the ambit of the *Cutler-Hammer* doctrine (War.R. 149 n. 8).

D. The Enterprise Case No. 538

This case began in a way similar to the other two, but it comes to this Court in a somewhat different posture. Here the district court ordered arbitration of discharge grievances, but the company, after arbitrating, refused to comply with the award requiring reinstatement of the grievants with back pay. As it comes to this Court, the issue in the case is whether the court below erred in modifying the dis-

trict court's order directing that the arbitrator's award be enforced in full.

From April 5, 1956 through April 15, 1957, a collective bargaining agreement between the company and the union was in effect which prescribed the wages, hours and working conditions for the employees and which also provided a grievance procedure of the usual kind, including the right ultimately to submit any "differences . . . as to the meaning and application of the provisions of this Agreement" to arbitration (Ent.R. 2a-4 to 6). Special provisions were made for discharge cases, requiring suspension and a hearing before discharge and providing that, if any employee was discharged after such hearing, he could appeal the discharge through the grievance procedure (Ent.R. 1a-17, 18). The remedy in discharge cases, as well as the standard to be applied by an arbitrator in such cases, was specified in the following provision of Article IV:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (Ent.R. 1a-18)

The grievance arose on January 17, 1957, when a group of eleven employees covered by the agreement left their jobs in protest against the discharge of another employee. Within thirty minutes, the employees were advised by a union staff representative to return. They then requested, and were given, permission from the president of the company to return to work. A few moments later, however, the president, after consulting his attorney, informed the local union president that the eleven men who had gone out "would not be permitted to return at the present time" (Ent.R. 2a-20). When the men attempted to return to work the following day, they found their time cards missing

from the rack, and they were told that they "didn't have any job there any more until this thing was settled one way or the other" (Ent.R. 2a-21).

On January 23 a grievance was filed, claiming that the men had been discharged improperly and without cause. (Ent.R. 2a-18). The grievance was not settled in the preliminary steps of the grievance procedure, and on February 17 the union requested that the matter be submitted to arbitration, in accordance with the agreement. The company first refused to arbitrate. Subsequently, the company changed its position and agreed to submit the matter to arbitration, and Milton H. Schmidt was chosen by the parties as the arbitrator. On April 6, 1957, however, the company again changed its position, and notified the union by letter that it would not arbitrate (Ent.R. 2a-2).

The union then brought an action in the United States District Court for the Southern District of West Virginia, under Section 301, to specifically enforce the arbitration provisions of the collective bargaining agreement. After the company had filed its answer (Ent.R. 2a-8), the union moved for summary judgment. The matter was heard on the pleadings and affidavits. The court rendered an oral opinion (Ent.R. 2a-11), and entered an order directing "specific performance of Step Four of Article III of the Agreement" (Ent.R. 1a-15).

Accordingly, the grievance was submitted to the arbitrator, who had previously been appointed by the parties. The company contended before the arbitrator that the employees had quit, that their discharge was justified by their participation in an unlawful strike, and that the grievance was, in any case, moot, since the agreement had expired on April 4, 1957.

The arbitrator found that the men had not quit and that their discharge was not justified (Ent.R. 2a-17 to 24). Conceding that their brief strike was improper, he found that management had agreed to permit them to return to

work and further that the company had violated its contractual obligation first to suspend employees before finally discharging them. The facts, he held, warranted at most a disciplinary suspension of 10 days for each of the grievants.

The arbitrator specifically rejected the contention that he could not order the grievants reinstated because the agreement had expired after their discharge. The controversy as to their right to reinstatement and back pay was a continuing one and Article IV of the agreement, he held, imposed an unconditional obligation on the company. Accordingly, he awarded reinstatement with back pay, minus the pay for the 10-day suspension period and such sums as the grievants might have received from other employment (Ent.R. 2a-23, 24).

The company refused to comply with the award, and the union moved the district court for an order directing the company to show cause why it had not done so (Ent.R. 2a-24). On December 16, 1958, the court rendered an opinion and an order directing the company to comply with the arbitrator's award (Ent.R. 1a-1, 3).

The district court, after rejecting the company's contention that Section 301 did not confer jurisdiction on the federal courts to enforce arbitration awards providing benefits for individual employees, found that the award was valid and enforceable in every respect. It rejected the company's argument that the award was not sufficiently specific as to the manner of calculating back pay to be enforceable, and in answer to the argument that the employees could not be reinstated because the agreement had expired, the court pointed out that

> "To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrong doing. If the men had not been unjustly discharged, it must be assumed that their employment would have con-

tinued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract." (Ent.R. 1a-10, 11)

On appeal, the Court of Appeals for the Fourth Circuit first agreed with the district court that section 301 conferred jurisdiction on the federal courts to enforce an arbitration award rendered under a collective bargaining agreement, relying on its opinion in *Textile Workers* v. *Cone Mills Corp.*, 268 F. 2d 920 (4th Cir. 1959), *cert. denied*, 361 U.S. 886 (1959). It also held that the failure of the award to specify the amounts to be deducted from the back pay awarded made the award unenforceable as it stood, but that the defect could be remedied by requiring the parties to complete the arbitration so that the amounts due could be specifically ascertained.

The court of appeals also decided that the award of back pay for the period subsequent to April 4, 1957, could not be enforced. The court reasoned that because collective bargaining agreements "do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its term," it followed that employees who were discharged unlawfully during the term of an agreement could not enforce an award for back pay covering a period after the agreement had expired. On that reasoning, the court modified the judgment so as "to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration. . . ." (Ent.R. 49)

The union filed a petition for rehearing. On August 22, 1959, the petition for rehearing was denied (Ent.R. 51); but on the same day, the court modified its opinion so as also to omit from the portion of the award to be enforced the requirement for reinstatement of the discharged employees (Ent.R. 50). The net result was a holding that

employees discharged during the period of an agreement in violation of its terms were denied enforcement of an award ordering reinstatement because the award was rendered after the agreement had expired.

The only questions presented by the union's petition for certiorari relate to the action of the court of appeals in reversing the district court's order with respect to reinstatement and back pay subsequent to the termination of the agreement.

SUMMARY OF ARGUMENT

I. The decision of the Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), establishes that grievance arbitration is to be enforced in the federal courts as a matter of federal substantive law by looking at the policy of federal labor legislation and fashioning a remedy that will effectuate that policy. The problems to be solved in these cases, therefore, must be solved in the light of the function of the grievance procedure and its capstone, arbitration, in the collective bargaining process intended to be fostered by the National Labor Relations Act.

The purpose of the collective bargaining agreement is to avoid strikes by the negotiations of a standard to govern the future conduct of the parties. But the execution of an agreement does not serve this purpose, even if it restricts the right of the parties to use economic pressure to change its conditions during its term, unless there is some system of peacefully resolving disputes arising as to the interpretation and application of the agreement. It is impossible to anticipate or expressly deal with every problem which may arise during the term of a collective bargaining agreement. Furthermore, there are strong pressures in the collective bargaining process to find formulae which can result in an agreement even though they contain ambiguities. The method which is ordinarily

provided for resolving these ambiguities and providing a a kind of common law under which problems within the scope of the agreement are resolved is the grievance procedure.

The grievance procedure is an integral part of the collective bargaining process and has been recognized as such by the Congress, which included within the duty to bargain the duty to negotiate concerning questions arising under a collective bargaining agreement. Through the process of interpretation and application of the agreement, through the grievance procedure, gaps are filled in and the meaning of deliberately ambiguous phraseology is determined.

There is no requirement that the terminal point of the grievance procedure be arbitration. In many agreements the union reserves the right to strike if grievances are not resolved. But the Labor Management Relations Act of 1947 declared that the most desirable method for the settlement of grievance disputes was arbitration. Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have an agreement for a fixed term which sets the standards to be applied in the employment relationship, which provides a grievance procedure in which management's actions in particular cases can be tested, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its terms. Such agreements should be enforced in a manner consistent with the legislative policy that all matters in dispute during the term of an agreement should be resolved through arbitration.

The generous scope which should be given to an agreement to arbitrate grievances is emphasized by two facts. First, if the agreement contains an absolute ban against strikes, it constitutes a complete code governing the employment relationship. In any area in which there is no restriction on management's rights with respect to the em-

ployment relationship, the agreement necessarily must be read as giving management unlimited rights. The scope of the contract is the entire employment relationship. Second, it is plain that the kind of interpretation required of a labor agreement which serves as an all-embracing code is wholly unlike the kind of contract interpretation customarily performed by the courts. In order that this procedure operate as Congress intended it should as a peaceful method of resolving all disputes which arise during the term of an agreement, it is necessary that the courts respect and defer to the jurisprudence which has been developed in the interpretation and application of collective bargaining agreements.

II. The typical broad arbitration clause provides for arbitration of any disputes as to the meaning, interpretation, and application of the collective bargaining agreement. If the claim which the union wishes to present in arbitration is a claim that particular action taken by the management violates some provision of the agreement, express or implied, then that dispute should be found arbitrable and arbitration compelled. Similarly, in an action to enforce an award, if the arbitrator rendered his decision as a matter of interpretation and application of the agreement, the award should be enforced irrespective of the court's views as to the merits of the decision.

The courts, both state and federal, have developed two doctrines which have qualified this simple standard. The first is the *Cutler-Hammer* doctrine, under which the court makes a preliminary examination of the grievance to determine whether there is at least some basis upon which the union can make a respectable argument. This doctrine, represented here by the *American Manufacturing* case, is at war with both the words of the typical grievance arbitration provisions and its purpose. A decision that a grievance is not arbitrable because it is baseless con-

stitutes a final and binding decision on the merits by the court in place of the arbitrator whom the parties have agreed shall make that decision. Furthermore, it unbalances the collective bargaining relationship unless it is also held that the union has the right to strike if the employer refuses to abide by the agreement for reasons which are baseless or frivolous. It would be possible to limit the no-strike clause in that fashion, but such limitation would be destructive of the entire purpose of substituting the grievance and arbitration procedure for the strike. Finally, even the arbitration of frivolous grievances serves a useful purpose in the collective bargaining process since oftimes such arbitration serves as a safety valve for pressures which would otherwise result in illegal strike. The parties can, of course, contract that only grievances having some appearance of merit be arbitrated, but in the absence of such limitation, no court should refuse to compel arbitration because of its views as to the probable outcome in arbitration.

The second limitation developed by the courts is represented by the rule adopted by the First Circuit and by the Fifth Circuit here in the *Warrior and Gulf* case. This rule is that the court must, before ordering arbitration, determine for itself whether any specific provision of the agreement controls the grievance. There are two difficulties with this approach. First, as we have shown above, any collective bargaining agreement must necessarily contain many implied provisions. Particularly where there is an absolute no-strike clause, a finding that there is no provision in the agreement, express or implied, limiting management's action is the equivalent of an affirmative provision specifically giving management the right to take that action without fear of concerted action by the employees. Second, every grievance which sets forth a claim that management's action violates some provision of the agreement necessarily involves the interpretation and

application of the agreement. So long as there is a claim based on a particular clause or upon a contention that a restriction on management's action must be implied from the agreement there is no warrant for the court to inquire as to whether the claim is soundly based.

This view is not inconsistent with the principle that arbitration can be enforced only where the defendant has contracted to arbitrate, and it is the only one which will prevent the courts from becoming engaged wholesale in the determination of grievances on their merits.

III. The decision of the Sixth Circuit in the *American Manufacturing* case is disposed of very simply by what has already been said. The grievance concededly involved the application of a specific provision of the agreement and the arbitration provision is the typical broad one. It was not proper for the court to evaluate the merits of the grievance and dispose of it. That function the parties reserved for the arbitrator, no matter how "baseless" the grievance might appear to a court.

The case does serve, however, as a convenient illustration of the errors a court can make when faced even with a simple grievance. For the grievance is clearly not "baseless." The court assumed, as the premise for its conclusion, that the grievant's right to reinstatement was governed by the provision requiring seniority to be considered in the selection of employees for reemployment only "where ability and efficiency are equal." It is not at all clear, however, that, properly interpreted, the agreement does not give an absolute right to reinstatement to an employee who has been ill or disabled, subject only to management's right to discharge him for inability to perform the work. Certainly it would be strange to assume that the seniority status which is expressly conferred and protected by the agreement can be terminated in the case of an employee who has been temporarily absent due to ill-

ness, even if he has fully recovered, merely because his ability and efficiency are not superior to that of his replacement. Even assuming the applicability of the equal ability test, furthermore, there was no showing that other employees might not be less able or less efficient than the grievant. Finally, the kind of evidence before the court on a motion for summary judgment was clearly not such as to assure the conclusion that there could be no basis upon which the grievance could be granted.

IV. The question in the *Warrior & Gulf* case is somewhat more difficult, but should be resolved on the same basis. The contracting out of work, against which the grievance was filed, presents a very troublesome problem of contract application. Arbitration decisions differ, but they all agree that the question of whether the action of management in contracting out particular work has the effect of violating employee rights under the agreement is a question of interpretation and application of the agreement. The court below concluded, however, that under this agreement there was no provision dealing with contracting out and that the grievance did not, therefore, even present a question for arbitration. This would plainly be erroneous under the typical arbitration clause.

In this case, however, it was provided that "matters which are strictly a function of management shall not be subject to arbitration". This was construed by the court below as excluding arbitration of any contracting out grievance, no matter what the facts. This was erroneous. Properly construed, the limitation is the equivalent of the usual clause limiting arbitration to the interpretation and application of the agreement. This is so because the management action complained of in every grievance is taken pursuant to management's function, and right, to manage. The question in every grievance is whether management has exercised that function in such a way as to deprive employees of rights conferred on them by the agree-

ment. Management's undoubted right to hire and fire and direct the working forces is balanced against the specific protections provided elsewhere in the agreement. By limiting arbitration only to cases not involving "strictly," *i.e.* solely, a matter of management, the arbitration clause in this case merely requires that grievance be rested on a claim of violation of some provision of the agreement, express or implied. This is particularly obvious when it is noted that, except for this clause, the grievance and arbitration procedure would apply to "local trouble of any kind," whether or not a claim of contract violation was involved. The grievance in this case plainly did rest on the contract. Whether that reliance was well placed was for the arbitrator not for the court, as the Tenth Circuit has held in a substantially identical case, *Local 1912, IAM* v. *United States Potash Co.*, 270 F.2d 496, now pending in this Court on petition for certiorari. The history of bargaining on the subject of contracting out, and the past instances of it, which were also relied on by the court below and which are not present in the *U. S. Potash* case, plainly go to the merits of the grievance, not arbitrability.

V. In the *Enterprise* case, the district court ordered arbitration and the arbitrator held that the grievants were discharged in violation of the agreement, and were entitled to reinstatement with back pay notwithstanding the fact that the agreement had expired. He based this result not on the law of contract damages, but on the language of the agreement, which expressly prescribed that employees unjustly discharged during its term were to be reinstated with back pay. The arbitrator rejected the company's argument that once the agreement expired, the remedial provision also expired, holding instead that the remedy was applicable to all discharges which took place during the term of the agreement.

The court below, in holding that the award was en-

forceable only to the extent that it granted back pay up to the termination date of the agreement, erroneously considered the issue one of law. When an arbitrator rules that an employer has an obligation to take affirmative action to remedy a violation of the agreement, he is not enforcing the law or awarding damages, he is interpreting the agreement as requiring the employer to take that action. Since questions of interpretation and application of the agreement are for the arbitrator, the court should not review his decision on an action to enforce the award, any more than the court should pass judgment on the merits of a grievance before ordering arbitration.

Even under the common law, arbitrators' awards are not reviewable for error of law or of fact. This common law principle is at least as appropriate in the area of grievance arbitration as it is in commercial arbitration.

The court's decision means, in effect, that the question of whether employees who were discharged in violation of an agreement during its term should be reinstated cannot be an arbitrable question after the agreement has expired, but must be settled in collective bargaining. This decision is squarely contrary to the decision of the Sixth Circuit in *N.L.R.B.* v. *Knight Morley Corp.*, 251 F.2d 753 (1957) and the decision of the National Labor Relations Board in *Local No. 611, Int'l Chemical Workers*, 44 L.R.R.M. 1164, 123 N.L.R.B. No. 182 (June 5, 1959). In *Knight Morley*, the court held that even after an agreement expired, an employer may lawfully insist that the grievance and arbitration procedure is the only forum in which to discuss the reinstatement of employees who were discharged during the term of the agreement, and therefore may refuse to bargain about this subject at the bargaining table. And in *Chemical Workers*, the N.L.R.B. went one step farther and held that it was an unfair labor practice for a union, after the expiration of a collective bargaining agreement, to insist at the bargaining table on the

reinstatement of employees discharged during the term of the agreement, since that is a question which, under the agreement, can be settled by arbitration.

If the decision below is permitted to stand, therefore, it will mean that a union will be absolutely unable to gain reinstatement for employees discharged in violation of the agreement, once the agreement expires. The same would presumably be true as to any violation of an agreement which can be remedied effectively only by reinstatement of the status quo.

The effect of this situation on the smooth operation of the grievance and arbitration provisions of collective bargaining agreements could be disastrous. If the decision below is sustained it will be advantageous to employers to resist settling even meritorious grievances, and to delay arbitration as long as possible, in the hope that the expiration date of the agreement will come before an arbitrator's award can be rendered. This could mean the virtual destruction of the grievance procedure, particularly in short term agreements.

Even if the N.L.R.B.'s *Chemical Workers* decision is assumed to be erroneous, as we think it is, it would be contrary to the policies of the act to require the parties to settle by economic force issues which can and should be settled by the peaceful process of arbitration.

None of the precedents relied on by the court below involved the question of the authority of an arbitrator to interpret an agreement as requiring an employer to take affirmative action even after the agreement itself has expired. Rather, the cases cited by the court involved the totally different question of whether action taken by an employer after expiration or modification of an agreement can be deemed to be a violation of the agreement. These cases are therefore not relevant to the case at bar.

Finally, the decision below is inconsistent with the approach taken by this Court in *Vitarelli* v. *Seaton*, 359 U.S.

535 (1959). In that case, the Court held that an employee discharged from the Department of the Interior on security grounds, without being given the procedural rights he was entitled to under an Order of the Department, must be reinstated with back pay even though the Department could have discharged him summarily without any procedural safeguards, since the Department had not in fact exercised its power to discharge summarily. Although there are substantial factual differences between that case and the present case, the principle that an employee who is unlawfully discharged should be reinstated with full back pay even though he could have been discharged lawfully is fully applicable here. Indeed, the present case follows *a fortiori* from *Vitarelli*, since the question of remedy in *Vitarelli* was an original question for the court, while here the question is one of interpretation and application of the agreement to be decided by an arbitrator. Surely, if a court *must*, without benefit of any statute, grant reinstatement in an analogous situation, an arbitrator, who has the power to interpret and apply the agreement, *has the authority* to find that reinstatement, even after the term of the agreement, is the indicated remedy for a discharge in violation of the agreement which took place during its term.

ARGUMENT

I. THE RULES GOVERNING ACTIONS TO COMPEL ARBITRATION OR ENFORCE AWARDS UNDER SECTION 301 MUST BE BASED ON THE POLICY OF THE FEDERAL LABOR LAWS AND MUST BE CONSISTENT WITH THE ROLE OF GRIEVANCE ARBITRATION IN THE COLLECTIVE BARGAINING PROCESS.

It is our position that the courts below erred in refusing to compel arbitration in the *American Manufacturing* and *Warrior and Gulf* cases, and in refusing to enforce in full the arbitrator's award in the *Enterprise* case. Before exam-

ining the particular way in which we believe the courts of appeals erred in each of the cases, it is perhaps desirable that we set out explicitly the basic approach which we urge that the Court adopt in dealing with all three.

A. *The question here is one of labor law, not arbitration law.*

The first premise of any discussion of the problems here presented must be that it is a labor relations statute which is being enforced, not an arbitration statute. These cases are here because Congress, in 1947, decided as a matter of labor policy that collective bargaining agreements should be enforceable in the federal courts. Pursuant to that decision it enacted Section 301 of the Labor Management Relations Act, in order to "promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess., p. 17 (1947).

In *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957), this Court was called upon to determine whether, in a suit brought under Section 301(a), the grievance arbitration provision of a collective agreement could be specifically enforced even though, under state law, such a provision was unenforceable. The Court decided that arbitration could be enforced. And the decision of the Court in *Lincoln Mills* is therefore the premise upon which these cases must be decided.

In *Lincoln Mills,* the Court did more than conclude that grievance arbitration was specifically enforceable. The method by which it came to that conclusion was as important as the conclusion itself. Although the parties had alternatively argued, in accordance with the prior decision of the First Circuit in *Local 205* v. *General Electric,* 233 F. 2d 85, that authority for the desired result could be found in the United States Arbitration Act, 9 U. S. C. § 1 *et seq.*, the Court wholly ignored that statute. Grievance arbitration, the Court held, was enforceable in the federal courts as a result of the policy expressed in the federal labor relations law, not as a result of any law or policy governing arbitration as such.

The substantive law to be applied in suits arising under § 301(a), the Court said, was federal law to be fashioned from the policy of our national labor laws. 353 U. S. at 456. Some problems arising in fashioning that law could be resolved by reference to the substantive law contained in the Labor-Management Relations Act and "the penumbra of expressed statutory mandates." Others, the Court said, will be "solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U. S. at 457.

Once the Court approached the enforcement of grievance arbitration from the viewpoint of labor policy the answer was, of course, clear. Grievance arbitration is an animal completely different from ordinary contract arbitration. Other arbitration is a substitute for litigation, and the ancient judicial hostility to the enforcement of executory agreements to arbitrate arose from this fact. As Mr. Justice Storey said in a passage quoted by Mr. Justice Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121:

> "... When [the courts] are asked to ... compel the parties to appoint arbitrators whose awards shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the Government to protect rights and to redress wrongs."

Thus, where the courts believe, as this Court did in *Wilko* v. *Swan*, 346 U. S. 427 (1953) that there are special statutory protections for one party to a contract which may not be given full effect if the controversy is finally decided in a substitute forum they will not enforce the agreement to arbitrate.[5]

[5] Both the majority and the dissenting opinions in *Wilko* v. *Swan*

When dealing with a contractual substitute for litigation courts may be justified in examining carefully the agreement to arbitrate before compelling a reluctant party to submit to such a tribunal, and closing against him "the common courts of justice, provided by the government to protect rights and to redress wrongs." A dispute if not arbitrable is still litigable. Indeed, an argument as to whether a dispute is arbitrable in such a situation is an argument as to whether the dispute shall be decided by an arbitrator or by a court.

As this Court explicitly recognized in *Lincoln Mills*, however, this whole approach is inapplicable to grievance arbitration. The agreement to arbitrate grievance disputes is not a substitute for litigation. It is the substitute for a strike, or, as the Court stated it, the "*quid pro quo* for an agreement not to strike." 353 U. S. at 455. It is primarily a method of insuring industrial peace during the term of a labor agreement, not a method of providing more economical or speedier adjudication than is available in the courts.[5a]

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exemplify the conception of arbitration as a substitute for litigation. In the words of Mr. Justice Reed, for the Court, at p. 438:

> "Congress [by the Arbitration Act] has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."

Or, in the words of Mr. Justice Frankfurter, dissenting, arbitration has "the advantages of providing a speedier, more economical, and more effective enforcement of rights . . . than can be had by the tortuous course of litigation." 346 U. S. at 439-440. The difference between the opinions was a difference between the relative weight which should be given to statutory protection offered by the Securities and Exchange Act, on the one hand, and the Congressional recognition of the parties' voluntary designation of a non-judicial tribunal on the other. Both sides recognized that the agreement to arbitrate was an agreement to provide a fast and inexpensive substitute for litigation.

[5a] For a more complete discussion of the differences between commercial arbitration and grievance arbitration, see Brief for Petitioner, pp. 30-39, *Textile Workers* v. *Lincoln Mills*, October Term 1956, No. 211.

And, as we shall show below, a holding that a dispute is not arbitrable does not simply mean that it is to be resolved in the courts rather than by an arbitrator but, in reality, means in the usual case that the dispute is resolved finally in favor of the party opposing arbitration.

Unthinking reliance in grievance arbitration cases on the rules developed by the courts in dealing with ordinary contract arbitration—illustrated we believe by such discussion as is found in *Engineers Ass'n* v. *Sperry Gyroscope*, 251 F. 2d 133, 137 (2d Cir. 1957) and *Refinery Employees Union* v. *Continental Oil Co.*, 268 F. 2d 447, 454 (5th Cir. 1959) —thus constitutes an example of "one of the most treacherous tendencies in legal reasoning . . . the transfer of doctrines which are, in effect, generalizations developed for one set of situations to seemingly analagous yet essentially very different situations." *Braniff Airways, Inc.* v. *Nebraska State Bd.*, 347 U. S. 590, 603 (1954) (dissenting opinion of Mr. Justice Frankfurter).

B. ***The grievance and arbitration procedure of a collective bargaining agreement has special characteristics derived from the nature of the agreement and the national labor policy.***

Analysis of the function of the grievance procedure and its capstone, arbitration, in the collective bargaining process[5b] must begin with the National Labor Relations Act. Section 9 of that act, 29 U.S.C. § 159, confers on a union chosen by a majority of employees in a collective bargaining unit the power and responsibility to act as "exclusive" representative for all the employees in the unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The employer is obliged to bargain with that

[5b] For a thorough discussion of "The Structure of the Collective Bargaining Process," with particular emphasis on the role of the grievance procedure, see Appendix A of Brief for Petitioner, *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, October Term 1954, No. 51.

representative concerning all of the innumerable subjects which come under the heading of wages, hours, and working conditions, and the union has the right to attempt to enforce compliance by the employer with its position on any of those subjects by initiating concerted activities by the employees, including a strike. §§ 7, 13, 29 U.S.C. §§ 157, 163.

As the late Dean Shulman pointed out, "one might conceive of the parties engaging in bargaining and joint determination, without an agreement, by considering each case as it arises and disposing of it by *ad hoc* decision." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1003 (1955). Such *ad hoc* bargaining, however, is neither practical nor in accord with the statutory objective. One of the principal purposes of collective bargaining is to avoid strikes and other forms of industrial conflict. See N.L.R.A. § 1, 29 U. S. C. § 151. The method for doing this is, in Dean Shulman's words, for the parties to negotiate "an agreement to provide standards to govern their future conduct." Or as this Court early stated, "the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made." *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 342 (1939). And the duty to bargain collectively, as defined in Section 8(d) of the act as added in 1947, 29 U. S. C. § 158(d), includes the duty of bargaining concerning "the negotiation of an agreement" and also includes the duty of "execution of a written contract incorporating any agreement reached if requested by either party."

The execution of an agreement, even for a fixed term, will not alone serve the purpose of securing industrial peace. First of all, there must be some restriction on the parties' right to use the economic weapons at their disposal in an effort to change the provisions of the agreement during its term. Hence, this Court held in the *Sands* case that col-

lective action to force changes in an agreement during its term was not concerted action protected by Section 7 of the act. And, in 1947, Congress went further and in Section 8(d), 29 U. S. C. § 158(d), specifically excluded from the duty to bargain any obligation "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."

This only solves part of the problem, and indeed only a small part. There must be, in addition, some system of peacefully resolving disputes arising under the agreement. Although described as a "contract" in Section 301(a), the collective bargaining agreement more nearly resembles a statute. It is, as previously stated, a standard to govern future conduct. And since it is a negotiated standard, with all the necessities for compromise and even deliberate ambiguity which such negotiation often requires, and must govern a myriad of individual cases, it is a standard which necessarily often speaks in the most general terms.

It is impossible to anticipate every problem which may arise during the term of a collective bargaining agreement, and it would be impossible ever to conclude an agreement if the parties attempted to resolve every potential problem which they did anticipate. Many subjects therefore are dealt with in the agreement only in the most general terms. For example, on the critical question of what constitutes a proper ground for discharging employees, the collective agreement usually only provides that there must be "just cause" or, as in the *Enterprise* case, provides that an employee must be reinstated if he has been disciplined "unjustly." (Ent.R. 1a-18. See also, Am.R. 6, War.R. 18) There is no attempt and indeed could be no attempt to catalogue, or even define with great explicitness, what might constitute "just cause." Dean Shulman expressed it this way:

"Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find

> a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ. The urge to make sure of real consensus or to clarify a felt ambiguity in the language tentatively accepted is at times repressed, lest the effort result in disagreement or in subsequent enforced consent to a clearer provision which is, however, less favorable to the party with the urge. With agreement reached as to known recurring situations, questions as to application to more difficult cases may be tiredly brushed aside on the theory that those cases will never—or hardly ever—arise." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004 (1955)

The difficulty is accentuated where, as in the usual case, the agreement is intended to cover the entire employment relationship. It is possible, of course, for the parties to exempt certain subjects from the agreement, preserving their freedom to negotiate, and to strike, over issues on which they cannot reach agreement as to the standard to be applied. This is the practice, for example, in the automobile industry, where the parties deliberately refrain from establishing the standards to govern the critical question of the speed of the production line. This issue is kept as an issue on which the union, after the necessary preliminary negotiations, retains the right to strike even during the term of the agreement.[6]

The usual practice in American industry, however, is exemplified in the three cases now before this Court. In these cases there is no contemplation of the addition of new provisions to the agreement during the term, or of negotiation with the right to strike on subjects omitted from the agreement. The agreement is intended to govern the total employment relationship. It describes not only the rights of

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[6] Bureau of National Affairs, Collective Bargaining Negotiations and Contracts 77: 102-103.

the employees and the ways in which management's normal prerogatives to hire, fire, promote, assign employees and otherwise operate the plant will be limited, but also in what areas management will be permitted to exercise unrestrained discretion because there is no limitation in the agreement. The usual collective bargaining agreement, in short, is not only a statute governing the conduct of the parties during the term of the agreement, it is a complete code.

Most agreements, as in the three now before the court, contain a management clause, expressly conferring upon the employer unrestrained discretion in matters pertaining to the employment relationship except as that discretion is limited by the agreement. In other contracts this right of management may be implied. Whether the provision for management's rights is expressed or implied, the collective bargaining agreement constitutes a complete code of standards to govern the employment relationship during its term. It provides not only the benefits which the employees will be entitled to and the rules for their distribution but also, by negative implication, what benefits they are not entitled to receive. It necessarily has this effect because, in the agreement, the employees and the union give up the right to strike or take other concerted action concerning changes in the agreement or additions to it in the entire area of "rates of pay, hours of employment, or other conditions of employment." The agreement is fixed for the term and it therefore confers upon management the right to take any action with respect to such matters except as limited by the agreement. It contains, as it were, a Tenth Amendment.

When we couple this conclusion with the tremendous scope of the subject matter and the necessary nature of the negotiating process it becomes plain that the application and interpretation of this code is as much a part of the collective bargaining process as is the negotiation of the code itself. Much that is unspoken must be implied or drawn

from accepted understandings and practices in labor relations generally and from accepted understandings and practices of the parties to particular agreement. Tremendous gaps must, of necessity be filled in.[7]

> "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. . . . [T]he institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement." Cox, *Reflections Upon Labor Relations,* 72 Harv. L. Rev. 1482, 1499 (1959).

And even where standards are specified, they must be given content. Meaning can be given to standards such as "just cause" or "equal ability" only in the process of administration and adjudication. And federal law explicitly recognizes this process as part of the collective bargaining process. The duty to bargain as defined in Section 8(d) of the act includes not only the duty to confer concerning

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[7] One of these cases, *American Manufacturing,* for example, concerns the claimed right of an employee who had been absent because of disability to return to his job. The agreement plainly contemplates some such right, since it preserves the employees' seniority status during the absence. But it does not say whether the employee is entitled to return to his old job, or only to vacant jobs, and if only to vacant jobs, whether in his departmental seniority unit or in the entire plant. Nor does it say what is to happen if he is unable to perform his old job but can perform others. In that case, can he displace less senior employees on the jobs he can perform, or must he wait for vacancies? In either case, to which jobs does his right apply, those in his departmental unit or all of the jobs in the plant? The agreement gives no explicit answers. Nor is the *American Manufacturing* agreement singular in that respect. These questions are not explicitly answered in the agreements in the other two cases or, we might add, in the labor agreements covering the basic steel industry.

the negotiation of an agreement but also the duty to confer "on any question arising thereunder."

During the term of an agreement, the collective bargaining process does not take place by negotiation but by a process of application of the agreement to individual cases as they rise. The first step is not a meeting but action by management. Management hires and fires. It schedules the work, promotes and demotes. It lays workers off and recalls them. It pays wages and vacation and holiday benefits. These are all management functions. The employees, through the union, participate in the process through the filing and processing of grievances claiming that management's actions are contrary to the standards set forth in the agreement, either expressly or impliedly. It is in the processing, adjustment and settlement of these grievances that the continuing collective bargaining relationship takes place. See *Hughes Tool Co.*, 104 N. L. R. B. 318, 326-327 (1953).

In the light of these considerations it is plain that the process of interpretation and application of a collective bargaining agreement though the grievance procedure has certain special characteristics. Grievances do not arise only because of differences as to matters of fact, such as whether an employee did or did not commit certain acts or even whether a particular senior employee has the ability to fill a higher-rated job for which he has applied in accordance with the seniority provisions of the agreement. Nor are such disputes limited to the explication of broad standards such as "just cause" for discharge. Many disputes will involve disagreement as to whether management's rights in a particular area are or are not impliedly limited by the agreement. For example, if an agreement does not explicitly deal with discharges at all but does provide a system of seniority rights to govern promotions, transfers, layoffs, etc., is management restricted at all in its power to discharge employees? See *Atwater Mfg. Co.*, 13 Lab. Arb. 747 (1949). When an agreement provides for overtime pre-

miums but does not say whether employees must work overtime, can management require employees to work more than 40 hours? See *Sylvania Elec. Products, Inc.*, 24 Lab. Arb. 199 (1954). Or if an agreement specifies specific rates for specific job classes, is management free to determine without opportunity for a review whether a particular job falls in one class or another? The resolution of such disputes is necessarily a part of the continuous collective bargaining structure which is represented by the grievance procedure.

As in every collective bargaining process there must be a terminal point to the grievance procedure. The terminal point of the grievance procedure can be the right to strike. That was the case in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.* 348 U. S. 437 (1955). Today the typical collective bargaining agreement, as in all three of the cases now before this Court, provides for arbitration as the terminal point.

This, again, is in accordance with the policy of our national labor laws. Without provision for the arbitration of grievances, the object of minimizing industrial strife and eliminating strikes is only partially achieved by the negotiation of an agreement. And so Section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. 173(d) provides in part as follows:

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have, then, an agreement for a fixed term which sets the standards to be applied in the employment relationship for its term, which provides a grievance procedure in which management's actions in particular cases can be tested against

the general standards provided for or implied in the agreement, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its term. Such agreements are fully in accord with the policy and the specific provisions of our national labor laws. Since Congress has declared in Section 301 that such agreements should be enforced as contracts, they should be enforced in a manner consistent with those policies.

C. The statute and the national labor policy require that the court's recognize the broad scope of arbitration as an integral part of the collective bargaining structure.

Where the parties have provided, as they usually do, that all questions of interpretation and application of the agreement which cannot be solved by the grievance procedure are to be resolved in arbitration, and that there shall be no strikes during the term of the agreement, all of the questions of the kind referred to above must necessarily be regarded as coming within the scope of the grievance and arbitration system. For a decision that the particular subject is not "covered" by the agreement is really a decision that under the agreement management's rights with respect to that subject are unrestrained.

Obviously the process of interpreting and applying a collective bargaining agreement requires more than a familiarity with the English language.

> "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture. The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different." Cox, *Reflections on Labor Arbitration,* 72 Harv. L. Rev. 1482, 1493 (1959).

This kind of "creative" interpretation requires skills and data unlike those involved in that kind of contract interpretation customarily performed by the courts. Grievance arbitration has become something of an institution. It has its own body of jurisprudence, which is familiar to both labor and management. Labor arbitrators have become a profession unto themselves, complete with their own professional academy. Courts are by and large unfamiliar with this institution. It is not necessary that they become familiar with it, but it is necessary that they respect it and defer to it if it is to continue to operate effectively as Congress intended it should, as a peaceful method of resolving industrial disputes.

Respectable argument can be made that the collective bargaining agreement as a whole, including the arbitration process, would best serve its purpose if it were not judicially enforceable. See Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955), Aaron, *On First Looking into the Lincoln Mills Decision,* Arbitration and the Law—Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators 1 (McKelvey ed., 1959). Much of the American labor movement has traditionally taken that view.[8] But Congress has settled that argument by enacting § 301(a). Its constitutionality is now established and it has been applied, without question by any member of the Court, as authorizing the development of federal law in suits involving damage liability of unions for violation of a no-strike clause. *Lewis* v. *Benedict Coal Corp.,* 28 U. S. Law Week 4105 (February 23, 1960). It remains for this Court to develop and apply, in suits by unions to enforce the *quid pro quo* for such a clause, doctrine which will, through the "usual processes of the law" which Congress consciously chose instead of the administra-

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[8] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

tive processes of the Labor Board,[9] effectuate the expressed Congressional purpose to promote industrial peace.

II. UNDER THE TYPICAL GRIEVANCE ARBITRATION CLAUSE, THE ONLY QUESTION FOR THE COURT IN AN ACTION TO COMPEL ARBITRATION IS WHETHER THE CONTENTION SOUGHT TO BE ARBITRATED IS THAT MANAGEMENT HAS VIOLATED THE AGREEMENT, WITHOUT REGARD TO THE COURT'S VIEW OF THE MERITS OF THAT CONTENTION; IN AN ACTION TO ENFORCE AN AWARD, THE ONLY QUESTION IS WHETHER THE AWARD IS BASED UPON THE AGREEMENT, WITHOUT REGARD TO THE COURT'S VIEW OF THE MERITS OF THE DECISION.

The typical arbitration clause usually contains language similar to that contained in the American Manufacturing Company agreement:

> "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation, and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .
>
> "The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. . . .
>
> "The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . ." (Am.R. 7-8).[9a]

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[9] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

[9a] This is in substance the arbitration provision which has been recommended by the War Labor Board (*e.g., Hospital Supply Co.*, 7 War Lab. Rep. 526, 529 (1943)), the President's National Labor-Management Conference of 1945 (Vol. 3, doc. 89), and the American Arbitration Association (In Labor Arbitration Procedures and Techniques, p. 9 (1958)).

In any action to compel arbitration or to enforce an award, the question presented is whether, under that or similar language, the employer is obligated to submit to arbitration the particular grievance which the union wants to arbitrate, or whether, if there has been an arbitration, the employer is obligated to comply with the award.

If the views we have set forth above as to the nature and function of arbitration under this kind of clause are correct —and we do not believe that they can successfully be controverted—the answer to the question is both clear and simple. If the claim which the union wishes to present in arbitration is that a particular action of management violates some provision of the agreement, express or implied, then the dispute is within the arbitration clause and arbitration should be compelled. Similarly, in an action to enforce an award, if the arbitrator rendered his decision as a matter of interpretation and application of the agreement, the award was within his jurisdiction and should be enforced, absent fraud or some other element which vitiates the proceeding.

These answers are so simple, the marvel is that they require stating at all. Yet the incredible fact is that most courts have, in one way or another, given quite different answers, or qualified their answer in a way which destroys its effectiveness. And this, in turn, has led to a flood of criticism by students of labor arbitration, many of whom have reached the conclusion that the courts are simply incapable of comprehending the nature of grievance arbitration. See, *e.g.* Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass,* 2 Buff. L. Rev. 1 (1952); Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration,* 2 Lab. L. J. 502 (1951); Cox, *Current Problems in the Law of Grievance Arbitration,* 30 Rocky Mt. L. Rev. 247 (1958); Kharas & Koretz, *Judicial Determination of the Arbitrable Issue,* 11 Arb. J. 135 (1956); Aaron, *On First Looking into the Lincoln Mills Decision,*

op. cit. supra.; Cox, *Reflections upon Labor Arbitration,* 72 Harv. L. Rev. 1482 (1959).

The simplest, and most destructive, qualification has come to be referred to as the *Cutler-Hammer* doctrine, and first found expression in *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 67 N.Y.S. 2d 317, *aff'd,* 297 N.Y. 519, 74 N.E. 2d 464 (1947). Under this doctrine, a court which is requested to order arbitration can refuse to do so on the ground that the answer to the grievance on the merits is so clear that there is nothing to arbitrate. In the *Cutler-Hammer* case itself, the Appellate Division said:

> "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."

The *Cutler-Hammer* doctrine has been criticized by every student of the question who has written on it and it is doubtful whether the New York courts themselves today follow the *Cutler-Hammer* doctrine. See Kharas & Koretz, *Judicial Determination of the Arbitrable Issue,* 11 Arb. J. 135 (1956); Note, 10 Syracuse L. Rev. 278 (1959). The Court of Appeals for the First Circuit has clearly rejected the *Cutler-Hammer* doctrine:

> "[I]f . . . the grievance in question is confided to an arbitrator by the collective bargaining agreement, the court in a §301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement." *New Bedford Defense Products Division* v. *Local No. 1113, UAW,* 258 F. 2d 522, 526 (1958).

The *Cutler-Hammer* approach is represented here by the decision of the Sixth Circuit in the *American Manufacturing* case, which we will deal with more in detail below. It

has also, apparently, been adopted by the Second Circuit which, relying on precedents in commercial arbitration, has said that the moving party must "produce evidence which tends to establish his claim" before a court will compel arbitration. *Engineers Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133 (1957), *cert. denied*, 356 U.S. 932 (1958). See also *Butte Miners Union* v. *Anaconda Co.*, 159 F. Supp. 431 (D. Mont. 1958), *aff'd*, 267 F. 2d 940 (9th Cir. 1959).

At first glance, the *Cutler-Hammer* view may seem reasonable. Why should a court of equity compel an employer to arbitrate a grievance which is clearly without merit, one might ask. The answer at the verbal level is that the agreement does not limit the employer's obligation to arbitrate to grievances which a court thinks have merit. Rather, the employer has undertaken to arbitrate any disputes over the interpretation and application of the agreement which cannot be settled between the parties. In determining that a grievance is "baseless" or "frivolous" the court has assumed the function which the parties have assigned to the arbitrator. A denial of arbitrability on the ground that the grievance is baseless constitutes a final and binding decision on the merits. The union, in exchange for the agreement not to strike, has obtained the right to arbitrate all disputes arising under the agreement, not only cases which management or a court believes have at least some appearance of merit.

The necessity of this conclusion is emphasized if we turn the coin over. If a union is to be deemed to have the right to process only grievances which have some appearance of merit, is management required to grant all grievances unless the union or a court believes there is some reasonable ground for believing that the grievance is not meritorious? Limiting the scope of the arbitration clause only to cases in which there is some uncertainty as to the outcome must imply a legal obligation on both parties; on the union not to press claims which a court regards as baseless and on

the company not to press defenses which a court regards as baseless. But there is no way in which such a mutual obligation can be enforced other than by reading an exception into the "no strike" clause so as to permit the union to strike whenever a grievance which is plainly meritorious is not granted. Such a result is possible, but it would be destructive of the whole system under which the grievance and arbitration procedure is substituted for the strike as a method of settling all disputes during the term of an agreement.

The arbitration clause, then, is not an agreement that only meritorious disputes will be arbitrated, it is an agreement that all disputes over the interpretation or application of the agreement will be arbitrated, and it must be so construed if the policy of our national labor laws is to be implemented. Furthermore;

> "it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the danger of excessive judicial intervention." Cox, *Current Problems in the Law of Grievance Arbitration,* 30 Rocky Mt. L. Rev. 247, 261 (1958).

The second qualification is a more sophisticated one and is best represented by the line taken by the Court of Appeals for the First Circuit in *Local 149* v. *General Electric Co.,* 250 F. 2d 922 (1957), *cert. denied,* 356 U.S. 938 (1958) and *Local 201* v. *General Electric Co.,* 262 F. 2d 265, 271 (1959). Although the force of these decisions is somewhat limited by the fact that, in at least one of the cases, and perhaps in both, the no-strike clause was limited only to grievances found to be arbitrable by a court, 262 F.2d at

268, the doctrine set forth in the cases was followed here by the Fifth Circuit in the *Warrior & Gulf* case and in *Refinery Employees* v. *Continental Oil Co.*, 268 F. 2d 447 (1959), *cert. denied*, 80 Sup. Ct. 199 (1959).

The rule, as stated by Judge Magruder in the *Local 201* case is:

> "It is not enough that appellant local may claim that the . . . grievance necessitates an interpretation or application of the seniority provisions of Art. XI. The Court must be satisfied that this claim is well founded, that is that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance."

This was applied, in the *Local 201* case, to conclude that an employee's claim that the company violated the seniority clause of an agreement by transferring him, rather than a junior employee, to the night shift was not arbitrable because the seniority provisions did not cover shift changes. The *Local 149* case involved a grievance claiming that a group of employees had been paid at a rate below that to which their jobs entitled them. The rates of pay for various job grades, referred to by number, as "grade 14," "grade 13," etc. were set out in "Exhibit B" of the agreement, but the agreement did not expressly describe the particular jobs which fell into the various job grades. The court concluded that this grievance could not involve the interpretation and application of the agreement, "since there is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitled him to be classified in any particular 'grade' carrying with it a corresponding wage rate." 250 F. 2d at 924-5. Therefore the court concluded that the grievance was not arbitrable.

The fallacy of the approach illustrated by these cases is that, as we have explained above, every grievance is gov-

erned by the agreement, either positively or negatively, particularly where the agreement contains a broad no-strike clause. For the denial of the grievance—or the preliminary denial of its arbitrability—constitutes a decision that, under the agreement, management's rights include the right to take the action complained of without limitation and without opportunity for redress by the employees.

Thus the decision as to whether the action complained of in a particular grievance is covered, or not covered, by the agreement necessarily involves an interpretation of the contractual clause relied on. The court's decision in the *Local 201* case, that the seniority clause governing employees to be "transferred" could not be read as limiting management's right to change an employee's shift, was as much an interpretation and application of that seniority clause as a decision that the union's grievance was valid would have been. Since the parties had agreed that questions of interpretation and application of the agreement were to be decided by an arbitrator, the court, rather than deciding the issue itself, should have ordered that it be submitted to arbitration.

The decision in the *Local 149* case equally, although perhaps less clearly, involved the interpretation of the agreement. As Professor Cox points out:

> "The words 'grade 14,' 'grade 13', etc. had meaning to everyone in the plant; for the established grades were part of the context in which the contract was executed, and although there might be argument about borderline cases, the system must have been plain enough so that most of the men could be classified with assurance. The entire wage scale would be upset by wholesale downgrading. In my view, there plainly was a dispute about the 'interpretation' to be put upon the words and symbols of Exhibit B. They had significance to the supervisors and rank-and-file workers to whom they were directed even though the court might not

known their meaning." Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1513 (1959).

But whether Professor Cox or the First Circuit are correct, clearly their difference was one which should not have been resolved by the court but by an arbitrator. Whether the agreement did or did not entitle the grievants to the rate of pay they claimed to be entitled to was clearly a question of interpretation and application of the agreement. They claimed it on the basis of the agreement. A conclusion that the agreement contained no "governing statute" giving them the right to the pay constituted a decision that management was entitled, under the agreement, to pay them at the lower rate.

We conclude, then, that the role of the courts in enforcing grievance arbitration is simply to determine whether the union seeking arbitration is claiming that the employer violated the agreement. If that is the claim it is arbitrable, even though the court cannot find any basis for the claim in the agreement, or even if the court thinks that on the facts of the case the claim is clearly without merit.

This view is not in the least inconsistent with the court's "inescapable obligation to determine as a preliminary matter" before ordering the parties to arbitrate a particular issue "that the defendant has contracted to refer such issue to arbitration, and has broken this promise." *Local 149* v. *General Electric Co.*, 250 F.2d at 927. We do not contend that the court must order arbitration without examining the nature of the parties' agreement to arbitrate. We contend only that an agreement to arbitrate "any question of interpretation and application" of a collective bargaining agreement must be construed to mean that whenever either party claims that the agreement has been violated an arbitrable question is presented. This is the only construction which would permit grievance arbitration to perform its function as a substitute for the strike, and as the *quid pro quo* for an absolute agreement not to strike. Moreover, this is the only construction which is consistent with the federal labor poli-

cies which, as this Court held in *Lincoln Mills*, is the source from which the federal law governing collective bargaining agreements must be derived.

The *Lincoln Mills* case certainly did not intend to make a potential federal question out of every industrial grievance. Yet if a court must determine whether or not a grievance is "baseless," or must interpret the substantive terms of the agreement before it compels arbitration, it will necessarily have to conduct a hearing on the merits of the particular dispute. To require the parties to litigate the merits of a grievance twice not only would be an unwarranted burden on them, it would be a burden on the federal courts.

Decisions such as those in the courts below have led some students of labor relations to conclude that the institution of grievance arbitration will be hindered rather than helped by the *Lincoln Mills* decision. See Aaron, *On First Looking into the Lincoln Mills Decision*, Arbitration and the Law—Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators 1 (1959); Feinsinger, *Enforcement of Labor Agreements, a New Era in Collective Bargaining*, 43 Va. L. Rev. 1261 (1957). It is certainly ironic that the *Lincoln Mills* decision, which was intended to promote grievance arbitration, is now being criticized in some quarters as being detrimental to the arbitration process. In our view that criticism is misdirected. It is not *Lincoln Mills* but the failure of some courts to apply *Lincoln Mills* properly which has led both to unnecessary litigation in the federal courts and to unwarranted judicial interference with the arbitrator's jurisdiction.

III. THE SIXTH CIRCUIT ERRED IN REFUSING TO ORDER ARBITRATION OF THE GRIEVANCE PRESENTED IN THE *AMERICAN MANUFACTURING* CASE.

A. *The grievance, concededly involving the interpretation and application of the agreement, is arbitrable irrespective of court's views as to its merits.*

As far as the *American Manufacturing* case is concerned,

very little need be added to what we have already said. The union's claim in that case very clearly involved a claim of violation of a specific provision of the agreement, namely, the seniority clause (Am.R. 20). The company had consistently taken the position that it had not violated that clause. There was therefore a dispute between the parties "as to the meaning, interpretation, and application" of that clause. Under the language of the agreement, such a dispute, if not otherwise adjusted, "may be submitted to the Board of Arbitration for decision" (Am.R. 7-8). The company refused so to submit it. The union was therefore entitled to an order compelling arbitration.

The Sixth Circuit refused to compel arbitration solely on the ground that it considered the grievance "baseless" and "frivolous." It did not dispute the fact that the issue between the parties concerned the interpretation and application of the agreement. Indeed, the court specifically stated that "a dispute or difference exists between the parties which, under Article IV, the appellant would be entitled to have submitted to arbitration, unless barred for the reason hereinafter discussed" (Am R. 68). Thus, the court refused to order arbitration, not because the grievance was not arbitrable under the agreement, but because the court considered the grievance clearly invalid on its merits. We have already indicated the reasons why that is not a proper ground on which to refuse to order arbitration.

The case, however, does furnish a convenient illustration of the errors which a court can make when it adopts the *Cutler-Hammer* approach and makes its own preliminary judgment as to whether a grievance is or is not "baseless." For the grievance in this case involves very difficult questions of contract interpretation as well as differences in the evaluation of the grievant's capabilities. It may be useful, therefore, to explore these questions.

B. *The grievance here involved serious questions of contract interpretation.*

Essentially, Sparks' claim was based on the seniority provision of the agreement, which stated in pertinent part as follows:

> All new employees shall be considered on a temporary or probationary basis for the first sixty (60) days of their employment. If retained after that period an employee is to be considered as a qualified regular employee and shall have seniority status as of the date of employment.
>
> The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis.
>
> * * * *
>
> When an employee is off due to illness he shall notify the Company as soon as possible and shall confirm by mail not later than three (3) days from the beginning of absence from work.
>
> Continued illness shall be reported once each week by mail, and the Company may require medical proof of illness.
>
> Failure to report illness in accordance with above described procedure can be considered as a voluntary quit.
>
> The Company will furnish forms for reporting by mail at no cost to the employee. (Am.R. 11)

The Court assumed, without discussion, that under this clause Sparks could be reinstated only if his ability and efficiency were equal to some other (unspecified) employee or employees. But that would be true only if the right of an employee to return to work after absence due to sickness or

disability were governed by the clause governing "the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies . . ." Is reinstatement after an illness "re-employment"? On analysis, that is a very unlikely interpretation. Since the sentence speaks in terms of "selection" of employees, it seems to contemplate the situation in which there is a group of employees desiring a smaller group of job opportunities—as for example, in the case of a cutback in production. But the case of an employee who has been absent due to sickness or disability is quite different. He is simply asking to be given the same status which he would have had had the sickness not occurred. In other words, he is simply asking that his "seniority status" "as a qualified regular employee," which is conferred by the first paragraph of the seniority clause, be restored.

The court's interpretation would mean that whenever an employee is absent due to sickness, he would have no right to return to work even if he could demonstrate that he had fully recovered his health and previous ability, unless he could demonstrate that his "efficiency and ability" are equal to some else's, presumably that of the person who occupied his job during his illness. This is totally out of keeping with normal employment practices, even in unorganized enterprises.

It can be argued, in other words, that the refusal to restore an employee who has been off sick to his job is subject to the same rules as if he had never been away. The question is not, then, whether his abilities are equal to those of someone else, but whether there is sufficient ground to displace him from his job. The agreement provides standards to cover such cases. The management clause (Am.R. 6) specifically provides that among the causes for discharge are inefficiency, contagious disease, "and any other ground or reason that would tend to reduce or impair the efficiency of plant operation." It certainly does not say that an em-

ployee can be discharged whenever his ability and efficiency are not equal to other employees.

Thus, it is probable that the requirement of "equal" ability and efficiency does not apply to employees seeking reinstatement after an illness or disability, and that by virtue of the "seniority status" conferred by the first paragraph of the seniority clause, such an employee is entitled to be reinstated unless his ability and efficiency are so low as to justify his discharge. At the very least, the court's interpretation of the agreement, which it assumed without any discussion of possible alternative interpretations, is very questionable.

But let us assume that the requirement of "equal" efficiency and ability does apply to an employee seeking to return to work after an absence due to illness or disability. Whose ability and efficiency would Sparks have to equal in order to get back his job? Would the standard be the most able and efficient employee in the plant, the average ability and efficiency of the employees in the plant (or the department or the crew), the least able and efficient of the employees, or would it have to be the employee with whom he was competing for the job, *i.e.*, the man who had replaced him when he was sick? The court does not say. There is no evidence in the case as to the ability and efficiency of any other employee. Perhaps the employee whose ability and efficiency Sparks must equal also has had a previous back injury, or perhaps he is an unusually inefficient and incompetent man. Would that not be relevant even under the court's interpretation? In the absence of evidence on that question, could the court, even under its own interpretation of the seniority provision, logically conclude that the grievance was baseless?

The court apparently assumed that the efficiency and ability which Sparks was required to "equal" were of the highest quality, although there is no basis in the record for that assumption. Then, turning to the evidence concerning Sparks' physical condition, the court ruled that it was friv-

olous to contend that Sparks could meet this standard of ability. In reaching this conclusion, the court relied on four things: the allegations made by Sparks in the workmen's compensation proceeding, the earlier position of Sparks' doctor that Sparks was 25 percent permanently disabled, the testimony of the company doctor that Sparks was still unable to do work requiring heavy lifting or prolonged stooping or bending, and the testimony of the Plant Manager that there were no jobs in the plant which did not require heavy lifting, stooping, and bending.

The allegations made by Sparks in the workmen's compensation case could all have been true when made and yet Sparks, by the time the grievance was filed, might have fully recovered his physical ability to work. Moreover, one would be less than realistic to assume that the pleadings in a workmen's compensation case are always the complete and unexaggerated truth. One arbitrator, dealing with a very similar case, had this to say:

> "Claims are often filed and settlements negotiated when the employee's real condition is not entirely clear. This is particularly true in back and heart cases. The employee needs the money; the insurance company is anxious to conclude the matter so as to terminate liability. Moreover, a certain percentage of cases take on the litigious atmosphere of personal injury lawsuits; the employee feels he must exaggerate his symptoms, the insurance company feels it must minimize the injury, and both sides can find doctors who will support their respective views. Under these circumstances the participants often lose sight of the true purposes of Workmen's Compensation; proper treatment, prompt rehabilitation, and restoration to the labor forces. It may be that this is the best system for handling occupational injury which human intelligence can devise. It may be that a more satisfactory method can be developed. At any event, it is clear that Espinosa's re-

ceipt of a compromise settlement did not bar him from reinstatement in line with Article VIII of the Collective Bargaining Agreement." *Convair Division*, 27 Lab. Arb. 288, 290 (Arthur M. Ross, Arbitrator, 1956.)

Thus, it can safely be said that regardless of what Sparks' attorney might have written in his workmen's compensation pleading, it is very possible that Sparks, at the time he filed his grievance, was as able to work as any other employee.

As for Sparks' doctor's earlier opinions, they are certainly not conclusive in view of his later opinion that Sparks was "able to return to work without danger to himself or to the others." The court discounts that later statement, saying that it "falls far short of saying that he could return to his former position with 'ability and efficiency' equal to that of other employees." The court chose to believe the company doctor because his statement was more specific. But could Sparks' doctor's opinion not also be interpreted to mean that Sparks had fully recovered, and was fully as able to work as he had been before? And should we not assume, in the absence of contrary evidence, that Sparks prior ability and efficiency were satisfactory? For purposes of summary judgment, should the evidence not be construed in the light most favorable to the union?

It can safely be concluded, we submit, that the court below erred in ruling that the Sparks grievance was "baseless." In making this ruling, the court assumed without discussion that under the agreement Sparks would have to demonstrate "equal efficiency and ability." This assumption is probably false. At least, it is questionable, and surely the arbitrator, and not the court, should have decided just what the rights of an employee who has been absent due to sickness or disability are under the agreement. In addition, the court held that it was "frivolous" to contend that Sparks' ability and efficiency were equal to that of some other employee or employees, without even facing the ques-

tion of just what employee's ability Sparks had to equal, and without any evidence on what that employee's ability was. Finally, the court did not correctly evaluate the evidence which was available as to what Sparks' ability and efficiency were at the time the grievance was filed.

Thus, this case is a perfect illustration of the inability of courts to make a correct preliminary judgment on the merits of a grievance, and the absolute necessity of holding the parties to their obligation to arbitrate all disputes concerning the proper interpretation and application of the agreement.

IV. THE FIFTH CIRCUIT ERRED IN REFUSING TO ORDER ARBITRATION OF THE GRIEVANCE PRESENTED IN THE *WARRIOR AND GULF* CASE.

A. *The nature of the grievance.*

The grievance in this case alleged that the employer had violated the collective bargaining agreement by contracting out to independent concerns work which had formerly been performed by employees in the bargaining unit. The subject of contracting out of bargaining unit work is not specifically mentioned in the agreement, and the union did not contend that the agreement prohibited any and all such contracting out. Rather, the union's position was that the agreement impliedly prohibited management from contracting out when the result of such action would be to deprive employees of rights to which they were entitled under the agreement, and that that was the effect of the action taken by the company in this case.

The problem presented by this grievance is a familiar one in labor relations. A recent arbitration decision by the past president of the National Academy of Arbitrators, G. Allan Dash, contains a thorough analysis of the problem and a complete review of all of the arbitration decisions dealing with it. *Celanese Corp.*, 33 Lab. Arb, 925 (1959). This decision contains a tabulation of 64 cases in which a union

challenged management's action in contracting out work despite the fact that the applicable agreement did not deal expressly with this subject at all. In 45 of these cases, the arbitrators held that the agreements contained certain implied limitations on the management's right to contract out. Most of the remaining cases seemed to hold that there was at least a requirement that the action be taken by the company in good faith, and not for the purpose of undermining the collective bargaining relationship. Most significantly of all, not one of the arbitrators had any doubts that the question involved the interpretation and application of the agreement, although in 10 cases the argument was made that the grievance was not arbitrable. 33 Lab. Arb. 925 at 941-945.

This is an area in which arbitration decisions differ widely, depending not only on the underlying attitude of the arbitrator, but on the facts of the particular case, the practices and customs in the plant, and the language of the agreement. A few hypothetical cases will demonstrate that there can be no simple, uniform rule to govern all cases of contracting out. Suppose a typical collective bargaining agreement—such as the one in this case—covers the production and maintenance workers in a large manufacturing establishment. Suppose the management determines to lay off, not a few, but all of its production workers, retaining its supervisory staff and continuing its manufacturing operation at full speed by contracting with an independent firm to supply labor to be performed in the plant. Suppose that the decision to do this is based on reasons of economy, resulting from the fact that the contractor could supply labor at lower rates and without the fringe benefits specified in the collective bargaining agreement.

Under these circumstances, even without any specific mention of the subject of subcontracting, it would seem eminently reasonable to find a violation of the employer's agreement that certain rates should be paid for certain jobs

and that the workers on those jobs should have seniority rights.

When we move from this extreme hypothetical situation to situations where only a portion of the work previously done by the employees in the bargaining unit is contracted out, the problem becomes more difficult. This is the kind of situation which is presented when a portion of the maintenance work, such as window washing or janitorial services, is contracted out, although the bulk of the bargaining unit work remains to be performed by the regular employees. If the contractor, in addition to supplying labor also supplies equipment and materials, and completely performs a definite segment of work unrelated to the main business of the plant, it becomes increasingly difficult to find a contract violation. Also significant is whether the work which is contracted out is done on the employer's premises or is done at the premises of the contractor. At the opposite extreme of our initial hypothetical case is one in which an employer decides that he will not produce a certain part of the material he has formerly produced but will purchase it from a contractor. In that case a claim that the employer is violating an implicit agreement not to narrow the collective bargaining unit is highly unlikely to be successful.

Between the two extremes there is, of course, a broad spectrum. Each case must rest upon its own facts. A decision in no case can really be reached by broad statements that contracting out is a function of management or, on the other hand, that the employer has a duty not to undercut the agreement which he has made as to the wages, hours and working conditions of those who perform certain jobs. Relevant in each case will be not only the nature and amount of the work contracted out, the place in which it is performed, and the motivating factors behind the company's decision to contract the work out, but also the whole fabric and history of the collective bargaining relationship as well as, perhaps, the existing practice in the plant or even

in the industry which the parties may have assumed when they made their collective bargaining agreement.

B. ***The grievance in this case is arbitrable under the arbitration clause of the agreement.***

The court below held that "the contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees." (War.R. 111). In so holding, it held in effect that *no* contracting out grievance, even the extreme hypothetical case set out above, would be subject to arbitration. This is plainly untenable, since the purpose of a collective bargaining agreement which contains an absolute no-strike clause is to provide the rules which will govern *all* the problems which arise in connection with the employment relationship during its term. It may be that under the agreement management has the unrestricted right to contract out any or all bargaining unit work. But if so, it has that right by virtue of the agreement.

How can this be, one might ask, when management would have the right to contract out work in the absence of any agreement? How can the agreement confer on management a right which it already has, especially when the right is not even mentioned in the agreement? The answer is that by inclusion of the no-strike clause, the agreement confers on management a right which it does not otherwise have—the right, in areas where it is not restricted by the agreement, to take actions with respect to matters relating to wages, hours and working conditions without prior consultation with the union, and without fear of economic reprisal from the union. This is a very valuable right. In a sense, without a collective bargaining agreement management does not have the right to do anything relating to the employment relationship without the consent of the union representing its employees. That consent may be negotiated, or it may be given tacitly after negotiations reach an impasse, by virtue of the union's inability to call

or to sustain a strike. But consent which is given out of economic necessity is consent nonetheless, and in a very real sense it is the only kind of consent which exists in labor relations. Thus the effect of a collective bargaining agreement which contains a no-strike clause is that the union has "consented," in advance, to any action which management might take which is not in violation of any express or implied provision of the collective bargaining agreement.

Therefore, the question whether the company had the right to take the action complained of by the grievance in this case is a question which could only be answered by an interpretation and application of the collective bargaining agreement. Under the usual arbitration clause, therefore, that question would plainly be arbitrable.

The arbitration clause in this case, however, is written somewhat differently than most. It begins with this rather perplexing sentence:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section." (War.R. 15).

Taken out of context, this is almost gibberish. It seems intended to exclude something from "arbitration," but what? In order to answer that, it is necessary first to read the rest of the "Adjustment of Grievances section."

Immediately after the sentence quoted above comes the following paragraph:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences in the following manner:" (War.R. 15)

The section then spells out the various steps of the grievance procedure, providing in the fifth step that "if agreement has not been reached the matter shall be referred to an impartial umpire for decision. . . The decision of the umpire shall be final" (War.R. 16).

In the absence of the opening sentence, the language above would make arbitrable not only "differences . . . as to the meaning and application of the provisions of this agreement" but also "any local trouble of any kind." It could be argued that this means that if "local trouble" arose as a result of the installation of new machinery, for example, the question of whether management should install that machinery would be arbitrable, even if it were conceded by the union that under the agreement there were no restrictions, express or implied, on management's right to do so. The effect of this argument would be to give the arbitrator the power to rewrite the agreement, and to impose additional obligations on management.

The opening sentence, then, is apparently some draftsman's inartistic attempt—perhaps made at the 11th hour of some long forgotten collective bargaining session—to preclude the union from pressing to arbitration claims not based on the interpretation and application of the agreement. In other words, unless the union contends that management's rights are limited, expressly or impliedly, by the terms of the agreement, the grievance is not arbitrable. The effect of the sentence is the same as the usual clause limiting the arbitrator to the adjudication of such claims.

The court below construed the sentence differently. It regarded the exclusion of matters "which are strictly a function of management" as requiring it to determine whether contracting out was limited by the agreement. It concluded that, in the absence of any specific clause dealing with the subject, management was entirely free to contract out work as it saw fit. That was a "function of management" and not subject to arbitration.

We have already indicated above our view that the absence of specific language on a subject does not mean that the subject is not covered by the agreement. Much must be implied in every collective bargaining agreement. This is particularly true where, as here, the no-strike clause is absolute. For in such a case, the statement of the court below "that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit" (War.R. 111) is simply not true. Management actions not found to be restricted by the collective agreement are affirmatively protected by the agreement. The matter is not "outside the scope of the contract" (Cox, *Reflections upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1515) unless the union has the right, which it had in the absence of a contract, to strike about it. If it has given up that right, a conclusion that there is no implied limitation on management's action means that management has affirmatively been given unlimited rights in that area by the agreement.

In this case, the issue is not whether contracting out is a function of management. The issue is whether other sections of the agreement limit management in the exercise of that function. There is no question, in words of Ralph Seward, one of the nation's leading arbitrators,

> "but that the Company has—and has always had—a broad general right to contract with other companies for the furnishing of goods and services. There is also no question but that it may not properly abuse that right—that it may not exercise it in such a way as to frustrate the basic purposes of the Agreement or make the Agreement impossible to perform. The 'implied obligations' issue, as posed in this case, is not whether the Company may contract *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work, at this particular plant and under the cir-*

cumstances of this particular case." Bethlehem Steel Co., 30 Lab. Arb. 678, 682 (1958) (Italics in original).

Once the nature of the grievance is recognized it is plain that it does not involve "*strictly* a function of management." We do not wish to question management's right to manage. We wish to question only whether it has so managed as to violate other provisions of the agreement. Our grievance can properly be determined only by balancing the employee rights under the agreement with management's right to manage, not by considering "strictly" the management's right and no others.

In this respect the grievance here is the same as virtually every other grievance which can arise under this agreement. The agreement contains, in Section 11 (War.R. 17) a typical "Management" clause. This clause vests in the company "exclusively" the general right to manage the company and to direct the working forces, including the right to hire and fire and to transfer employees, and the right to relieve them from duty for lack of work. Even in the absence of such a provision the company would have such rights. After all, it is the employer. It directs what work should be done, determines which employees are to be promoted or laid off, schedules the work and pays the wages (and, even though its right to do so is not expressly mentioned in Section 11, it contracts with other companies for the furnishing of goods and services). A grievance arises under a collective bargaining agreement not because management has performed these functions. That is not only its right but its duty. A grievance arises after management has performed its function if an employee or the union complains that in performing its function it has violated some other provision of the agreement.

Thus the company undoubtedly has the right to lay employees off. But if it lays off employee "A" and employee "A" has greater seniority than employee "B" who remains at work then employee "A" can file a grievance and com-

plain that the company exercised its undoubted right to lay off in a way which was a violation of the agreement. Equally, management undoubtedly schedules the work. But if the management, in scheduling an employee, requires him to work seven consecutive days, that employee can file a grievance complaining that the company in exercising its management function has violated the provision in this agreement that no employee shall be worked more than six consecutive days without 24 hours rest (War.R. 11).

Every grievance, in short, complains about the way management has exercised its undoubted right to manage. The complaint in every case is that in exercising that right, management has violated the provisions of the agreement. This is precisely the nature of the grievance here.

It follows that if the "strictly a function of management" clause is read as requiring a showing, as a prerequisite to arbitration, that management's action does violate some restriction in the agreement, then every grievance must be shown to be meritorious before it can be arbitrated. Contracting out of work—which is not specifically mentioned in the management clause of the contract—can surely not be more a management function than the "direction of the working forces" and the "right to relieve employees from duty because of lack of work," which are expressly mentioned. And plainly the "strictly a function of management" clause cannot be interpreted so broadly as to eliminate any meaning from the arbitration procedure which follows it.

Thus, the only construction of this clause which comports with the rest of the agreement is the one which we suggested above. No grievance is to be arbitrated which involves *only* a management function, *i.e.* which does not claim that management has violated some provision of the agreement, either express or implied. So read, the arbitration provisions here are no different than those in the other two cases and should be enforced where the union

claims, as it does here, that management has violated the agreement.

This conclusion is precisely the conclusion reached by the Tenth Circuit in *Local 1912, I.A.M.* v. *United States Potash Co.*, 270 F. 2d 496 (1959), now pending in this Court on petition for certiorari, No. 554. In that case, the "Management Functions Article" provided that "all matters related to this Company and its operations and employment with or by this Company . . . are exclusively within the jurisdiction of the Company and *not subject to Union action or consent or to arbitration,* except such . . . conditions of employment . . . as are specifically provided for in the terms of this agreement. . . ." *Id* at 497 (emphasis added). The agreement did not expressly mention contracting out. Nevertheless, the court, upon an analysis of the nature of the collective bargaining agreement similar to the one which we have urged here, held that a grievance protesting the contract out of bargaining unit work was arbitrable, and ordered arbitration.

The court below also held that management's rights to contract out must be held to be unrestricted in view of the existence of such action in the past and the union's failure to obtain in negotiations a clause forbidding contract out (War.R. 112). In the light of that history, the court concluded that the union's arguments based on the agreement were "insubstantial". Even if this conclusion were correct —which it is not—it goes to the merits, not to arbitrability. And, as we have argued above, the merits of a grievance are for the arbitrator, not for the court. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949, 955 (6th Cir. 1947) In any event, the union's claim, as Judge Rives pointed out in his dissent (War.R. 117-18), was not that all contracting out was prohibited by the agreement, but only that the particular contracting out involved in this case violated the agreement because it was of such a character as to undermine rights which the agreement guaranteed the employees.

That contention, whether the court considered it substantial or insubstantial, was clearly arbitrable under the arbitration clause of the agreement.

V. THE FOURTH CIRCUIT ERRED IN REFUSING TO ENFORCE IN FULL THE ARBITRATOR'S AWARD IN THE *ENTERPRISE* CASE.

In the *Enterprise* case, the question of the relative roles of the court and the arbitrator is presented not in the posture of an action to compel arbitration, but in the context of a proceeding to enforce an arbitrator's award. But the approach of the court should be the same in both situations. If a particular issue is entrusted to the exclusive jurisdiction of an arbitrator by the agreement, the court should neither attempt to pass judgment on that issue before ordering arbitration, nor review in any way the arbitrator's own decision before ordering the parties to comply with it.

A. *The question of whether the grievants were entitled to reinstatement with back pay was a question in the exclusive jurisdiction of the arbitrator.*

The arbitrator in this case decided that under the collective bargaining agreement the company was obliged to reinstate, with back pay, employees who had been discharged in violation of the agreement during its term, notwithstanding the fact that the agreement had expired by the time the award was rendered. This decision was based on the arbitrator's interpretation of the following provision of the agreement:

> "Should it be determined . . . by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost" (Ent.R. 1a-18).

The company argued to the arbitrator that this language was impliedly limited by the termination provision of the agreement, and that the agreement, read as a whole, could not be construed as giving any employee a right to reinstatement after the agreement expired. The arbitrator rejected this view, holding that "Article IV of the Agreement imposes an unconditional obligation on the Company to compensate an employee wrongfully discharged or suspended for time lost." (Ent.R. 2a-23)

The district court ordered the parties to comply with the award in full, but the Court of Appeals for the Fourth Circuit took it upon itself to decide *de novo* what the appropriate remedy for the improper discharges should be, and held that the grievants were entitled only to back pay for the period from their discharge to the expiration date of the agreement.

The court below seemed to treat the issue of remedy as one of law to be decided by a court. This, however, is a clearly erroneous view. When an arbitrator rules that an employer has an obligation to take affirmative action to remedy a violation of the agreement, he is not enforcing the law or awarding damages, he is interpreting the agreement as requiring the employer to take that action. That is particularly clear here, because the agreement provides an express provision dealing with the obligation of management in cases of unjust discharges. But even where such a provision is not present, a similar obligation is usually deemed to be implied in the obligation of management not to discharge except for just cause. In other words, an agreement not to discharge without cause is usually interpreted as carrying with it an obligation to reinstate a man who is so discharged. Almost every other substantive provision of an agreement is similarly interpreted by arbitrators as requiring management to take certain corrective action whenever it is found to be in violation of such a provision. See the arbitration decision cited by the Fifth Circuit in

Refinery Employees Union v. *Continental Oil Co.*, 268 F. 2d 447, 455 n. 10 (1959) *cert. denied*, 80 Sup. Ct. 199 (1959), in coming, erroneously, we believe, to the conclusion that the question of corrective action was not arbitrable. See also Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1494.

The arbitrator's decision on the question of remedy, then, is not a decision of law, but a decision as to what management was required to do under the terms of the agreement. Such a decision is not reviewable in a court.

That judicial review of the merits of an arbitrator's decision is out of keeping with the whole concept of grievance arbitration should be clear from our earlier discussion. Moreover, the terms of the agreement itself make clear that such review was never contemplated. Not only did Article III provide that arbitration awards rendered thereunder shall be "final and binding on the parties," but it further provided that

> ". . . neither party will institute civil suits or legal proceedings against the other for alleged violations of any of the provisions of this labor contract; instead, all disputes will be settled in the manner outlined in Article III—Adjustment of Grievances" (Ent.R. 2a-7).

Moreover, even in the absence of such clear language, it has always been the rule under the common law of arbitration that courts would not review the merits of arbitration awards for errors of law or of fact. Thus in an early decision this Court stated:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set

it aside for error either in law or in fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell* v. *March*, 17 How. 344, 349 (1855)

As we have pointed out, and as the court below recognized, many of the rules governing commercial arbitration are not suitable to grievance arbitration problems. The rule that the merits of arbitration awards are not subject to review, however, is one which would seem to fit the needs of grievance arbitration perfectly, since it allows the arbitrator to exercise his expert judgment in applying particular agreements to particular cases, without having to worry about legal doctrines which he considers inapplicable.

This does not mean, of course, that the court could not reverse decisions in which the arbitrator exceeds his jurisdiction, or where fraud, bribery, or some other flaw in the arbitration process itself can be demonstrated. But where the arbitrator has jurisdiction to interpret and apply the agreement, his decision as to what the agreement requires the employer to do, if fairly reached, should not be reviewable by any court.

Consistent with this view, the union in this case accepted the arbitrator's determination that both 10 days wages and the amounts received by the grievants for other employment should be deducted from the back pay awarded (Ent.R. 2a-24). It might well be argued that such deduction was contrary to the flat mandate of the agreement that the Company "pay full compensation at the employee's regular rate of pay for the time lost" in such cases. But the arbitrator determined, whether rightly or wrongly, that this remedial provision allowed the deductions to be made, and that determination was in the words of the agreement itself "final and binding on the parties" (Ent.R. 2a-6).

B. *The decision below conflicts with decisions of the NLRB the Sixth Circuit, as well as with the policies of the federal labor laws.*

By refusing to enforce the arbitrator's award, the court in effect held that the question of whether the company should reinstate the grievants was not arbitrable after the agreement had expired, and could only be settled by collective bargaining. This decision is squarely in conflict with a recent decision of the National Labor Relations Board, *Local No. 611, Int'l Chemical Workers,* 44 L.R.R.M. 1164, 123 N.L.R.B. No. 182 (June 5, 1959), and a decision of the Sixth Circuit on which the Board's ruling was based, *NLRB* v. *Knight Morley Corp.,* 251 F. 2d 753 (6th Cir. 1957).

The *Chemical Workers* case arose out of a set of facts very similar to those in the present case. The employer had discharged a group of employees shortly before the termination of a collective bargaining agreement, and the union sought their reinstatement. The grievance had not reached arbitration when the termination date of the agreement approached and negotiations for a new agreement were commenced. The union, instead of continuing to push the grievance to arbitration, made reinstatement of the employees one of the bargaining demands in the negotiations for a new agreement. The employer took the position that the dispute should not be made a part of the negotiations, but should be settled under the grievance and arbitration provisions of the expired agreement. The union adhered to its position, however, and refused to agree to any overall settlement which did not provide for reinstatement of the employees. The Board held that the union, by insisting at the bargaining table upon reinstatement of the employees, had committed an unfair labor practice.

This result followed, the Board held, from two well-established principles. The first is than an employer does not violate his duty to bargain collectively if he refuses to

discuss a matter at the bargaining table on the ground that it can appropriately be disposed of under the grievance and arbitration procedure of the collective bargaining agreement. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949 (6th Cir. 1947). The second is that it is an unfair labor practice for either party to insist to the point of deadlock on something which the other party is not obligated under the Act to bargain about. See *NLRB* v. *Wooster Division of Borg-Warner Corp.,* 356 U. S. 342 (1958).

The Sixth Circuit had previously held, in *NLRB* v. *Knight Morley Corp.* 251 F. 2d 753 (1957), that the *Timken* principle was applicable to an employer's refusal to discuss at the bargaining table the union's demand for reinstatement of certain employees who had been discharged during the term of the agreement, even though the agreement had since expired. The Board in *Chemical Workers* adopted the reasoning of the court in *Knight Morley,* and therefore concluded that it was an unfair labor practice for the union in similar circumstances to insist on reinstatement as a prerequisite to reaching an agreement. And, in doing so, it expressly relied on the *Lincoln Mills* case and the policy in favor of settling disputes through arbitration.

Therefore, under the National Labor Relations Act as it had been interpreted and applied in *Knight Morley,* the employer in the present case was not obligated even to discuss with the union, outside of the grievance and arbitration procedure, the question of the reinstatement of the discharged employees. And under the Board's *Chemical Workers* decision, the union would have been guilty of an unfair labor practice if it had insisted on such reinstatement as a prerequisite to an agreement with the company on other matters. Thus the only remedy available to the union was the grievance and arbitration procedure of the collective bargaining agreement, and this was the remedy which the union here pursued.

The decision of the court below, however, would effec-

tively deprive the union of that remedy as well, since it holds that the company need not comply with an arbitration award ordering reinstatement of these employees. Thus, although the employer violated the collective bargaining agreement by discharging the employees, and although the employees would still in all likelihood have had their jobs but for that violation, there would be no way in which the employer could be compelled to reinstate them. The union is thus truly caught on the horns of a dilemma. If it asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the union insists to the point of deadlock, it is guilty of an unfair labor practice. If it invokes the grievance and arbitration procedure, the employer can, under the decision in the present case, refuse with impunity to comply with an award ordering reinstatement of the employees. If this Court permits the decision below to stand it will mean that there is absolutely no way in which the employer's wrong can be undone, and the employees' injury be remedied.

We strongly disagree with that aspect of the Board's holding which would prohibit a union, after expiration of the agreement, from attempting to settle outstanding grievances at the bargaining table. But even if we assume that the Board erred in holding that a union is forbidden to insist at the bargaining table on reinstatement of discharged employees, the Board and the Sixth Circuit are unquestionably correct in holding that the question of reinstatement can appropriately be decided under the grievance and arbitration procedures of the agreement, even if the agreement has since expired. To hold otherwise is to frustrate both the intent of the agreement and the policies of the act.

As we have shown, the use of arbitration as a method of resolving grievance disputes is specifically stated to be an objective of the act. If the present decision is permitted to stand, however, it will seriously injure the operation of the grievance and arbitration procedures in all collective bar-

gaining agreements. Arbitration is always preceded by several "steps" in the grievance procedure, involving discussions between union and employer representatives as ascending levels of authority. Such procedures work satisfactorily only when a large proportion of grievances presented can be settled at the early stages, without resort to arbitration, since arbitration is expensive and time-consuming, particularly if a backlog of unresolved grievances is permitted to accumulate. Prior to the present decision, the existence of an arbitration clause always tended to promote the prompt and fair settlement of grievances, even in cases where the grievance never reached arbitration, since each party was aware that if its position lacked merit it would not ultimately be sustained by the arbitrator. Under the decision below, however, it would be advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing contract will have expired and an award favorable to the union would not be enforceable.

The decision below obviously cannot be limited only to discharge grievances. It will apply in every case in which the remedy for a violation of a collective bargaining agreement which took place during its term is the restoration of the status quo, and when such restoration must take place, because of the passage of time, after the contract has expired. In every such case the reasoning which the court below used in the present case would be applicable: since the employer had the absolute right after the expiration of the agreement to change the status quo, the arbitrator cannot order reinstatement of the status quo after the agreement had expired.

The net result would be a serious impairment of the objective sought to be achieved by the Labor-Management Relations Act. The grievance and arbitration procedure, instead of providing the alternative to a strike as the method for resolving disputes, which Congress declared to be de-

sirable in Section 203(a) of the act, would simply serve as a method of postponing the issue until the expiration of an agreement. Collective bargaining for a new agreement would necessarily involve not only the establishment of standards for a new agreement but also the resolution of all disputes remaining from the past.

A large proportion of collective bargaining agreements, like the one involved in the present case, are for a term of one year. Under such an agreement, an employer might be able to postpone settlement of virtually all grievances until the termination date of the agreement. Whether he did so or not, many grievances would necessarily be pending at the termination date. Even under long term agreements, this would be true as to grievances which arise during the last year or so of the agreement's term. The result necessarily will be to encourage industrial strife and to diminish the prospects for the peaceful conclusion of collective bargaining agreements.

That this result is not fanciful is illustrated by the facts of this case. The parties were able, when their agreement expired, to reach agreement on all issues dealing with the terms of a new agreement. But there has been no new agreement and there has been a strike. The sole issue is the dispute over the reinstatement of the eleven employees discharged during the term of the prior agreement (Ent.R. 2a-32). As a result of that dispute, the company and the public are not protected by a no-strike agreement, and the employees are not protected by a written agreement as to the terms and conditions of their employment.

We submit therefore, that the policies of the act will be very severely endangered if the decision of the court below is permitted to stand. This would be true even if the *Chemical Workers* case and the *Knight Morley* case did not exist. The fact that those cases do exist, and that the Board is undoubtedly going to continue to follow them, makes the situation doubly serious.

C. *The precedents on which the court below relied are inapplicable to the case at bar.*

None of the cases relied on by the court below involved the question of whether an arbitrator had the authority to decide what the remedy should be for a violation of a collective bargaining agreement which took place during its term. For that reason, alone, those cases are totally inapplicable to the present case. However, they are also inapplicable for a different reason. Even if we assume that the question of what remedy the grievants were entitled to was a question for the court, none of the cases relied on below dealt with that question. Rather they involved the completely different question of whether there had been any violation in the first place.

In *System Federation No. 59* v. *Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941), cited by the court, the question was whether employees who were furloughed during or after the term of an agreement can gain reinstatement on the basis of their seniority after the agreement expires. The principal violation alleged was the failure to reinstate, not the original furloughing. The court there held, quite properly, that the seniority rights created by the agreement existed only so long as the agreement existed, and the employer could not be said to have violated those rights after the agreement expired. There was also a claim that some of the original furloughings, which took place prior to the expiration of the agreement, were in violation of the agreement, but as to that claim the defense was that "there is no showing that [the employees] applied for and were denied reinstatement while the 1929 contract was in force." 119 F. 2d at 511. The court held that after the abrogation of the contract, these employees lost their right to *apply* for reinstatement under its terms. In the present case, however, the employees filed their claim, or grievance, promptly, long before the agreement expired, and the question was whether they lost their right to reinstatement merely because

the employer refused to give it to them promptly, and forced them to go to the trouble and expense of litigation and arbitration.

In *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (6th Cir. 1945), which the court also cited, the employee's claim was that he was furloughed in violation of a collective bargaining agreement which had been modified by subsequent agreements between the union and the employer prior to the alleged violation. The court simply held that a union, in its capacity as bargaining agent, can modify an agreement and thereby terminate rights which exist under it. Thus the result in that case was based on the fact that the agreement on which the claim was based was not in effect at the time the alleged violation took place. In the present case, the agreement was violated during its term, and the only question was whether reinstatement was a proper remedy. The same distinction applies to *Beeler* v. *Chicago R. I. & P. Ry.*, 169 F. 2d 557 (10th Cir., 1948), *cert. denied*, 335 U. S. 903 (1949), in which the holding was that at the time of the alleged violations the employee was not covered by any collective bargaining agreement; to *Edelstein* v. *Duluth M. & I. Ry.*, 225 Minn. 508, 31 N. W. 2d 465 (1948), in which the holding was that the discharge of the employees involved did not violate the applicable collective bargaining agreement; and to *Walker* v. *Pennsylvania-Reading Seashore Lines*, 142 N. J. Eq. 588, 61 A. 2d 453 (1948), in which the holding was that the agreement which allegedly was violated had been validly modified before the alleged violations took place.

The difference between the question of whether a violation has occurred, and the question of what the remedy should be for an admitted violation, is well expressed by another arbitrator who reached the same result as was reached by the arbitrator in the present case:

> "The Company's position on this issue appears to confuse the act of violation with the remedy provided

for the violation. When a contract violation takes place during the term of the contract, the right to seek the pertinent remedy immediately accrues. The violation opens the door and from that moment the right to relief becomes available, and this right extends as long as the resultant injury continues, notwithstanding that in the interim the contract has expired. This is graphically illustrated by the recognition that the Company does not contest the arbitrator's right to enter an award after the contract's expiration date, sustaining the propriety of the discharge. In this situation it is the other side of the coin, for in either instance, whether directing reinstatement without back pay, or whether directing reinstatement with back pay, or upholding the discharge, the arbitrator is granting relief.

"For these reasons the arbitrator concludes that the Company's position is untenable, and the arbitrator finds that he does have the power at this date to direct reinstatement with full back pay in those cases where, in his opinion, such a finding is justified." *Armour & Co.*, 11 Lab. Arb. 600, 604-605 (1948). See also *R. Hershel Mfg. Co.*, 30 Lab. Arb. 575 (1958).

The court below also cited cases to support the proposition that while the collective bargaining agreement was in effect the employees "could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time." This we do not deny. But the discharges in this case took place before the expiration date of the agreement, and the question as to what the employer had the right to do after termination is totally irrelevant. *Meadows* v. *Radio Industries, Inc.*, 222 F.2d 347 (7th Cir., 1955), *Atchison, T. & S. F. R. Co.* v. *Andrews*, 211 F.2d 264 (10th Cir., 1954) and the citations which followed these in the opinion below, stand only for the hornbook rule that individual employment contracts are termin-

able at will unless they explicitly provide to the contrary. They do not deal with the question which is at issue here.

Finally, the court cited *United Protective Workers* v. *Ford Motor Co.*, 223 F.2d 49 (7th Cir., 1955) and *Odell* v. *Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir., 1953), *cert. denied*, 345 U. S. 941 (1953), for the proposition that when a contract of employment provides that termination will be preceded by a period of notice, damages for improper discharge are limited to compensating the plaintiff for the notice period. We do not disagree with that statement of the law, but we do disagree with the implication that it leads to the result which the court reached in the present case.

The basis of that principle as applied to an individual employment contract is clear. It is simply a corollary of the general rule that damages are calculated so as to put the injured party in the position in which he would have been but for the defendant's wrong. If an employee is discharged summarily although his contract of employment gave him the right to one month's notice, he is entitled to one month's pay as damages, and not reinstatement, because the wrong consisted of the failure to give notice, and not the discharge. It would not be realistic to assume that if the wrong had not been committed the employee would not have been discharged; the natural assumption is that he would still have been discharged, but with the proper notice.

In a collective bargaining situation, however, the case is quite different. The protection afforded employees by a collective bargaining agreement normally is not the right to notice prior to discharge, but the right not to be discharged at all, except for just cause. Thus, if the wrong in this case had not been committed, the employer would not have discharged the employees at all. In the absence of any evidence that the employer would have discharged the employees at the termination date of the agreement, there is no

basis for assuming that he would have done so. See *Western Union Tel. Co.*, 83 N.L.R.B. 238, 239 (1949).

The error of the court's decision in the present case can perhaps best be demonstrated if we assume a slight variation in facts. Let us assume that the discharge, the arbitration proceeding, and the award all took place during the term of the agreement, but the action to enforce the award was not decided until after the expiration date. Could the court in those circumstances order the employer to comply with the award and reinstate the employees? Under the decision below, the answer would have to be no, since in the hypothetical case as in the actual case the union is asking for reinstatement at a time when the agreement has expired and the employer has the right to discharge at will. But surely the employer does not relieve himself of the obligation to abide by an award rendered during the term of the agreement solely by refusing to abide by it until the agreement expires. Similarly, he does not relieve himself of the obligation to reinstate employees who are unjustly discharged during the term of the agreement, solely by refusing to do it until the expiration date of the agreement. In neither case is the expiration of the agreement at all relevant. Once the agreement is violated, during its term, the right to a remedy vests—whether the violation is a discharge, a failure to abide by an award, or any other violation. That right is not affected by the subsequent modification or termination of the agreement, unless the right is waived by the union. The question as to what the employer had the right to do after expiration is not present or relevant; the only question is as to the appropriate remedy for a violation of the agreement which took place during its term.

D. *The decision below is inconsistent with Vitarelli v. Seaton*, 359 U. S. 535 (1959).

The decision below, that employees who were discharged in violation of an agreement during its term had no right

to reinstatement with full back pay after the agreement expired, is in conflict with the approach taken by this Court in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959).

Vitarelli, an employee of the Department of the Interior, had been discharged for security reasons on September 2, 1954. This Court held that the discharge was invalid, since Vitarelli had not been accorded the procedural rights to which he was entitled under an Order of the Department which prescribed procedures for security discharges. That aspect of the case is not relevant here. The case involved a further complication, however. The parties conceded that the Department would have had the right to discharge Vitarelli summarily, so long as the discharge was not stated to be for security reasons. On October 10, 1956, the Department had sent Vitarelli a new notice of discharge, which purported to be a substitute for the original notice and which did not state that it was based on security grounds. The Government argued, therefore, that even if the original notification of discharge was invalid, the second notification was valid, at least as of the date of its issuance, and thus precluded any reinstatement. The Court rejected that argument:

> "Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons . . ., we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power."

In other words, the Court held that *while the Government had the power summarily to dismiss Vitarelli, it had not exercised that power, and therefore the remedy for the unlawful discharge was reinstatement with full back pay.*

The dissenting opinion took issue with the majority only as to the question whether the 1956 notification should be deemed a valid exercise of the Department's power to discharge summarily. The dissenters did not disagree with the

majority's position that reinstatement would be the appropriate remedy if the power to discharge—although it was present—had not in fact been exercised.

There are of course factual differences between the *Vitarelli* case and the present case. The present case involves private employees whose rights are derived from a collective bargaining agreement; *Vitarelli* involved a Government employee whose rights derived from a Departmental Order. But there is no difference in principle, so far as the issue with which we are now dealing is concerned. For purposes of this case, the important aspect of *Vitarelli* is that the Court there held that when an employee is unlawfully discharged the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally. That principle, which the Court accepted unanimously, is equally applicable in the present case.

Indeed, the argument of the union in this case follows *a fortiori* from *Vitarelli*. The Court in *Vitarelli* decided that an employee who was unlawfully discharged was entitled to reinstatement *as a matter of law*, although the employer could have subsequently discharged him legally. In this case the parties have themselves provided that if an employee is found to have been discharged in violation of the agreement, the arbitrator shall order reinstatement and back pay. The question here is simply whether the arbitrator has the power to construe that provision of the agreement as permitting the same remedy which the Court applied without benefit of any express statutory or other authority. Surely if a court *must*, without benefit of any statute, grant reinstatement in such a case, an arbitrator, who has the power, by agreement, to interpret and apply the contract, *has the authority* to find that reinstatement, even after the contract term, is the indicated remedy for a violation of the contract during its term.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgments of the Courts of Appeals for the Fourth, Fifth and Sixth Circuits in these cases should be reversed.

Respectfully submitted

ARTHUR J. GOLDBERG
DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER

1001 Connecticut Ave., N.W.
Washington 6, D. C.

Attorneys for Petitioner

COOPER, MITCH, BLACK & CRAWFORD
1329 Brown-Marx Building
Birmingham 3, Alabama
Of Counsel in Nos. 360 and 443

JAMES P. CLOWES
607 Riley Law Building
Wheeling, West Virginia

CARNEY M. LAYNE
1017 Sixth Avenue
Huntington, West Virginia
Of Counsel in No. 538